80-1520

NO. _____

Office-Supreme Court, U.S.
FILED
MAR 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

LINDA E. SANGSTER,

PETITIONER,

V.

UNITED AIR LINES, INC., A DELAWARE CORPORATION, AND AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert W. Tollen
Chickering & Gregory
Three Embarcadero Center
Twenty-Third Floor
San Francisco, California
Telephone: (415) 393-9000
Counsel for Petitioner

March 6, 1981

QUESTION PRESENTED FOR REVIEW

Whether, under Title VII of the Civil Rights Act of 1964, a discriminatee who fails to mitigate back pay damages may be punished by having all back pay denied or whether the discriminatee may be denied merely such amounts as could have been earned with reasonable diligence.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
REPORTS BELOW	3
JURISDICTION IN THE SUPREME COURT	5
STATUTORY PROVISION INVOLVED IN THIS CASE	5
STATEMENT OF THE CASE	7
REASONS FOR ALLOWANCE OF THE WRIT	15

APPENDIX A

Opinion of the United States Court of Appeals, Ninth Circuit, entered December 8, 1980.....1a

APPENDIX B

Opinion and judgment of the United States District Court for the Northern District of California, entered October 14, 1977.....9a

APPENDIX C

Reporter's Transcript of the findings of fact and conclusions of law delivered from the bench by the United States District Court for the Northern District of California on November 7, 1977.....29a

TABLE OF AUTHORITIES

Albemarle v. Moody, 422 U.S. 405 (1975).....16

Bullard v. El Dorado Tire Company, 512 F.2d 901 (5th Cir. 1975)....21

EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D. N.Y. 1976).....21

Franks v. Bowman, 424 U.S. 747 (1964).....23

Grindstaff v. Burger King, Inc.,
494 F. Supp. 622 (E.D. Tenn.
1980).....20

Hegler v. Board of Education
of Bearden School District,
447 F.2d 1078 (8th Cir. 1971)...18

Inda and Moritz v. United Air Lines,
405 F. Supp. 426 (N.D. Calif.
1975), 565 F.2d 554 (9th Cir.
1977).....12

John S. Doane Co. v. Martin,
164 F.2d 537 (1st Cir. 1947)....19

Parker v. Twentieth Century-Fox Film
Corporation,
3 Cal. 3d 176, 89 Cal. Rptr.
737, 474 P.2d 689 (1970).....22

Sangster v. United Air Lines and
ALPA, 438 F. Supp. 1221,
16 FEP Cases 617 (N.D. Calif.
1977), aff'd 633 F.2d 864,
24 FEP Cases 845 (9th Cir.
1980).....4

U.S. v. Lee Way Motor Freight, Inc.,
625 F.2d 918 (10th Cir. 1979)...19

REPORTS BELOW

The District Court granted plaintiff's motion for partial summary judgment and directed the entry of

judgment, reinstating plaintiff with full seniority, pursuant to FRCP Rule 54(b). The court's opinion in connection with that ruling is reported as Sangster v. United Air Lines and ALPA, 438 F.Supp. 1221, 16 FEP Cases 617 (N.D. Calif. 1977). See Appendix B. Following the entry of judgment under Rule 54(b), trial was held, limited to the issues of monetary relief. The court's opinion denying back pay, from which this petition results, is not reported. See Appendix C. The Court of Appeals' opinion affirming the District Court is reported as Sangster v. United Air Lines and ALPA, 633 F.2 864, 24 FEP Cases 845 (9th Cir. 1980). See Appendix A.

JURISDICTION IN THE SUPREME COURT

Petitioner seeks a writ of certiorari to review the judgment and opinion entered by the Court of Appeals For the Ninth Circuit on December 8, 1980. Jurisdiction is conferred on this Court by 28 U.S.C. § 2101(c).

STATUTORY PROVISION INVOLVED IN THIS CASE

The sole statutory provision involved is § 706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g), which reads in full:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of

employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him or any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

STATEMENT OF THE CASE

Linda E. Sangster, then an unmarried woman,[1] was first employed by United Air Lines as a stewardess on November 24, 1961. As a stewardess, Mrs. Sangster was required to be a member of the Air Line Pilots Association ("ALPA"), and her terms of employment were governed by the collective bargaining agreement between ALPA and United. At the time Mrs. Sangster was hired, United and ALPA maintained a then legal policy of denying employment as stewardesses to women who were married.

On May 28, 1966, Mrs. Sangster, then still unmarried, was promoted to the non-flight position of stewardess-supervisor. This change of

---

1/ For convenience, we use her married name throughout.

status did not affect her seniority as a stewardess, which continued to accrue in accordance with the provisions of the applicable collective bargaining agreement as though she were still on active stewardess service. Nor did it preclude a later return to stewardess status with full accrued seniority covering both her tenure as a stewardess and as a supervisor, should she so choose.

On April 9, 1968, Mrs. Sangster married. Notwithstanding enactment of the Civil Rights Act in 1964, United and ALPA had not by then modified their no-marriage rule. They did not do so until November 7, 1968, when in response to various grievances and EEOC charges previously filed by terminated United stewardesses, United and ALPA agreed that marriage would no longer

disqualify a stewardess from continuing in the employ of the company as a stewardess. The new agreement between United and ALPA did not modify United's no-marriage rule insofar as it prohibited the hiring of married women as stewardesses, nor insofar as it barred married supervisors from exercising their contractual rights to resume stewardess service. Mrs. Sangster learned of these subtle distinctions on November 8, 1968, the day after the new agreement was signed, when she requested transfer to stewardess status and was rejected because she was married.

Within 90 days of the rejection of her request, Mrs. Sangster filed a charge with the EEOC. She had also initiated an internal company grievance procedure for non-union personnel, but,

on June 4, 1969, her last appeal through the grievance procedure to the president of United Air Lines was rejected. On July 16, 1969. Mrs. Sangster resigned as an employee of United Air Lines.[2/]

Mrs. Sangster did not seek employment from another airline after termination at United. She was familiar with the industry practice of refusing to hire married women and believed she could not be hired. If she could have been hired, she would have had to have been domiciled elsewhere than the San Francisco Bay Area, where she and her husband maintained their home. San Francisco was a senior base for most airlines, and she would be starting over

---

2/ The District Court held that she was entitled to quit her employment with United, and that ruling was not disturbed by the Court of Appeals.

again without the eight years seniority she had accumulated with United.

Mrs. Sangster made efforts to obtain employment in local restaurants and cocktail lounges, and she reviewed classified want-ads for clerical positions, but was discouraged because of the requirement that applicants be experienced.

According to the defendants' testimony, an inflight supervisory position was available at United beginning some time in 1970, presumably without regard to marital status, although that point was not brought out at trial. Mrs. Sangster testified that she was aware of that position during the last few years of her unemployment (which ended in 1977) and had not applied for it.

Thus, Mrs. Sangster did not obtain alternative employment at any time prior to her reinstatement with United Air Lines, pursuant to court order, on November 1, 1977.

On April 19, 1972, the EEOC issued its Decision in Mrs. Sangster's case, finding reasonable cause to believe that United and ALPA had violated Title VII by refusing to allow Mrs. Sangster to resume duties as stewardess because of her status as a married woman.

Although the EEOC had notified Mrs. Sangster that it would attempt conciliation, she heard nothing further from that agency. In late 1975, Mrs. Sangster learned indirectly from Mrs. Kathleen Moritz, plaintiff in Inda and Moritz v. United Air Lines, 405 F. Supp.

426 (N.D. Calif. 1975), 565 F.2d 554 (9th Cir. 1977), through their respective husbands, both of whom flew for United Air Lines, that it was not necessary to wait for the EEOC. Mrs. Sangster immediately contacted Mrs. Moritz' attorney, and the present lawsuit followed. Jurisdiction in the District Court was invoked pursuant to § 706(f)(3) of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e-5(f)(3).

On October 14, 1977, the trial judge granted Mrs. Sangster's motion for partial summary judgment, finding that United and ALPA had violated the Act and ordering her reinstated with full seniority. The court ordered judgment as to that part of the case entered pursuant to Rule 54(b).

On November 7, 1977, a one day trial was held on the issues of backpay and attorney's fees. At the conclusion of the trial, the trial judge ruled that . . . "the plaintiff did not mitigate her damages, has not sought to mitigate her damages, and, therefore, is not entitled to any recovery for back-pay." No evidence had been placed before the trial court as to the "amounts earnable with reasonable diligence," §706(g), 42 U.S.C. § 2000e-5(g), in order that the court could "reduce the back pay otherwise allowable", § 706(g). Nevertheless, in what petitioner views as an unauthorized and impermissible punishment for Mrs. Sangster's failure to mitigate, the court ruled that she was entitled to no backpay whatsoever.

Mrs. Sangster appealed the trial court's judgment denying her backpay: CA No. 78-1289. ALPA appealed the trial court's earlier Rule 54(b) judgment on liability, arguing issues of timeliness, laches and so forth, but not the underlying violation: CA No. 1242. On December 8, 1980, the Court of Appeals affirmed the District Court in all respects. In this petition for certiorari, Mrs. Sangster seeks review of the Court of Appeals' judgment in CA No. 1289, affirming the trial court's decision to deny all backpay, without regard to the amounts otherwise earnable with reasonable diligence.

REASONS FOR ALLOWANCE OF THE WRIT

At slip opinion page 4, the Court of Appeals referred to the holding

of this Court in Albemarle v. Moody, 422 U.S. 405, 421 (1975), to the effect that "back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." At slip opinion page 6, the Court concluded that "Sangster did not meet her duty to mitigate her damages, and that denial of back pay under the circumstances would not frustrate Title VII's remedial purposes."

This punitive logic for denying Sangster all backpay, without regard to determining approximately how much she could have earned in mitigating employment, is in conflict with the

plain language of the Civil Rights of 1964 and with the decisions of other federal courts of appeals and the court of last resort in at least California. It also sanctions such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Section 706(g), 42 U.S.C. § 2000e-5(g), provides, in relevant part, that "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable." In Mrs. Sangster's case-in-chief, she showed what she would have earned if the defendants had permitted her to resume stewardess service, notwithstanding her

marital status. Assuming that she failed to mitigate (an issue that Mrs. Sangster challenged in both courts below), the plain language of § 706(g) requires the trial court (1) to make some finding as to the "amounts earnable with reasonable diligence" by the plaintiff, (2) to deduct those amounts from "the backpay otherwise allowable," and (3) to award the plaintiff the balance.

In Hegler v. Board of Education of Bearden School District, 447 F.2d 1078 (8th Cir. 1971), a race discrimination case arising under 42 U.S.C. §§ 1981 and 1983, the Court of Appeals for the Eight Circuit wrote that "[t]he overwhelming authority places the burden on the wrongdoer to produce evidence showing what the appellant could have

earned to mitigate damages." 447 F.2d at 1081.

In John S. Doane Co. v. Martin, 164 F.2d 537 (1st Cir. 1947), a case arising under the veterans reemployment provisions of the Selective Training and Service Act of 1940, 50 U.S.C.A. Appendix, § 308(e), the Court of Appeals For the First Circuit wrote that, "[i]n the matter of mitigation of the damages, the burden is upon the respondent to produce evidence showing the amount of money the petitioner did earn, or with reasonable care and diligence could have earned . . . ." 164 F.2d at 541.

In U.S. v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979), a case arising under Title VII of the Civil Rights Act of 1964, the trial

court had found that some claimants had adequately mitigated their backpay losses and some claimants had not. The trial court did not punish the nonmitigating claimants by denying them all backpay. Instead, the trial court used the average earnings of the mitigating claimants as a basis for calculating interim earnings for the nonmitigating claimants. This approach was approved by the Court of Appeals for the Tenth Circuit. 625 F.2d at 938.

In Grindstaff v. Burger King, Inc., 494 F. Supp. 622 (E.D. Tenn. 1980), a case arising under Title VII of the Civil Rights Act, the court found that the plaintiff had earned $9,338.17 in mitigating employment, but that she could have earned $12,500.00. The court deducted $12,500.00 from the gross back

pay of $17,999.78 and awarded the plaintiff the balance of $5,499.78. 494 F. Supp. at 625.

In EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D. N.Y. 1976), affirmed by the Court of Appeals for the Second Circuit without published opinion at 559 F.2d 1203 (2nd Cir. 1977), a case arising under Title VII of the Civil Rights Act of 1964, the District Court held that, "[o]nce the gross back pay owed plaintiff has been determined, the burden shifts to the defendant to prove what should be deducted therefrom as '[i]nterim earnings or amounts earnable with reasonable diligence.'" 420 F. Supp. at 924.

In Bullard v. El Dorado Tire Company, 512 F.2d 901 (5th Cir. 1975), a case of wrongful discharge arising under

Florida law, the Court of Appeals For the Fifth Circuit quoted Dobbs, Remedies, §12.25, p. 925, to the effect that, "[i]f the employer has obtained a substitute job, or could obtain one by reasonable effort, he is chargeable with the income he obtains or could reasonably obtain in this fashion, but only if the employer sustains the burden of proving these facts." 512 F2d at 901.

In Parker v. Twentieth Century-Fox Film Corporation, 3 Cal. 3d 176, 89 Cal. Rptr. 737, 474 P.2d 689 (1970), a case of breach of contract to employ arising under California law, the California Supreme Court held that "[t]he general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the

amount earned or with reasonable effort might have earned from other employment." 3 Cal. 3d at 181. Although this case did not involve a federal statute, presumably the California Supreme Court would apply the same rule of law to any wrongful discharge.

The Court of Appeals' willingness to punish Mrs. Sangster for not mitigating her damages is also contrary to this Court's holding in Franks v. Bowman, 424 U.S. 747, 764 (1964), quoted by the Court of Appeals at slip opinion page 4, to the effect that persons aggrieved by discriminatory employment practices "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." In restoring a discriminatee to a position where he or

she would have been without the unlawful discrimination, it is fair to deduct losses willfully incurred, but deducting more leaves the victim of discrimination still a victim.3/

Given the Court of Appeal's decision in the case at bar, there is a difference of opinion among the circuits

---

3/ At slip opinion page 5, the Court of Appeals cited Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941), for the proposition that: "Under the NLRA, courts have long held that back pay is not to be awarded when the evidence shows a wilful loss of earnings." Emphasis added. The actual language reads as follows: "Since only actual losses should be made good, it seems fair that deduction should be made not only for actual earnings by the worker but also for losses which he wilfully incurred." 313 U.S. at 198 (emphasis added). The difference between the Court of Appeals' paraphrase and this Court's actual language parallels the difference between the Court of Appeals' result and petitioner's position herein.

as to whether a discriminatee who fails to mitigate should be denied all back pay or may be denied merely such amounts as could have been earned with reasonable diligence. The Supreme Court should allow a writ in order to resolve this important question in the administration of Title VII of the Civil Rights Act of 1964.

DATED: March 6, 1981.

Respectfully submitted,

ROBERT W. TOLLEN
CHICKERING & GREGORY

APPENDIX A

DEC 9 1980

FILED

DEC 8 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINDA E. SANGSTER, an individual, Plaintiff-Appellant, vs. UNITED AIR LINES, INC., a Delaware corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization, Defendants-Appellees.	No. 78-1242, 78-1289 D.C. No. CV 76-2426 SC OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and submitted August 13, 1980

Before: WRIGHT, GOODWIN and ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

This is an employment discrimination case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. Linda E. Sangster, a former airline stewardess, alleged that her employer, United Air Lines, Inc. (United), and her collective bargaining agent, the Air Line Pilots Association (ALPA) had discriminated against her on the basis of her sex. ALPA appeals on No. 78-1242 from the district court order granting Sangster's motion for pretrial summary judgment on the issue of liability and ordering her reinstatement with full seniority.[1] Sangster appeals in No. 78-1289 from the subsequent judgment denying her an award of back pay and awarding attorneys' fees. We affirm the district court in all respects.

FACTS

Sangster was hired by United on November 24, 1961 as an airline stewardess or flight attendant. She was unmarried at that time. On May 28, 1966 she was promoted to the

nonflight position of stewardess supervisor. This change in status did not affect her seniority as a stewardess, which continued to accrue in accordance with the provisions of the applicable collective bargaining agreement as though she were still in active stewardess service. The transfer did not preclude a later return to her position as stewardess with full accrued seniority.

On April 9, 1968 Sangster married a United pilot. She was aware that once married United's rules would bar her from resuming her former stewardess position and that she would forfeit her stewardess seniority rights. Nevertheless, she decided to continue in her employment as a stewardess supervisor after her marriage and to await the outcome of negotiations between United and ALPA, which she hoped would soon terminate the no-marriage policy.

United and ALPA did reach such an agreement on November 7, 1968. The agreement was only partially retroactive, however, and did not protect married stewardess supervisors who wished to transfer back to a flight position. When Sangster applied for transfer to stewardess status on November 8, 1968, United denied her application. The next day she filed a formal complaint under United's internal grievance procedure, and on February 6, 1969, she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Her grievance complaint was denied by United on June 4, 1969. On June 16th Sangster quit her employment with United.

On March 8, 1972 the EEOC found reasonable cause to believe that Sangster's charge of discrimination was well-founded. On October 12, 1976 the EEOC informed her that the dispute could not be reconciled and that she had a right to sue. On November 1, 1976 Sangster filed her complaint in district court seeking reinstatement with full seniority, back

pay and attorneys' fees.

The court granted Sangster's motion for pretrial summary judgment on the issue of liability and ordered Sangster reinstated with full seniority.

A trial was held on the issues of back pay and attorneys' fees. At the trial, Sangster testified as to her efforts to seek alternative employment. She had remained unemployed for the eight years between the day she voluntarily quit her job and the time United was ordered to restore her to her position as stewardess with full seniority. She admitted that she did not seek work with another airline after leaving United, either as a stewardess or in a supervisory or other capacity. Her efforts at obtaining other positions were minimal.[2/] Sangster testified that the stewardess position at United with her seniority intact was a unique position, enabling her to adapt her schedule to her pilot-husband's while being assigned to the same geographic area.

The district court found that Sangster was not interested in any other position during her eight-year period of unemployment and that she had not exercised reasonable diligence in obtaining substantially equivalent employment. Concluding that she had not met her obligation to mitigate her damages, and therefore was not entitled to compensation for the period of her unemployment, the court denied Sangster's request for back pay. The court awarded attorneys' fees against the defendants of $5,537.00, an amount substantially below the requested sum.

ALPA's APPEAL

ALPA contends that Sangster failed to file her charge of employment discrimination with the EEOC in a timely fashion. We find no merit in ALPA's contention that the 90-day filing period commenced on the date of Sangster's marriage. In

light of the remedial policies behind Title VII, we refuse to give the strained interpretation urged by ALPA as to when Sangster's right of action accrued and thus to deny her redress. See Mahroom v. Hook, 563 F.2d 1369, 1375 (9th Cir. 1977), cert.denied, 436 U.S. 904 (1978). It was not until Sangster attempted to transfer to a stewardess position on November 8, 1968 and felt the impact of the discriminatory transfer rule that the filing time began to run. Therefore, Sangster's charge filed on February 6, 1969 was timely filed.[3/]

SANGSTER'S APPEAL

A. Back Pay

An award of back pay in employment discrimination cases is one of the weapons in a court's arsenal to effectuate the dual purposes of Title VII: (1) to end discriminatory employment practices; and (2) to make employees whole for injuries suffered on account of unlawful employment discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). A finding of unlawful discrimination requires an award of back pay unless reasons exist "which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Kaplan v. International Alliance of Theatrical Stage Employees, 525 F.2d 1354, 1363 (9th Cir. 1975) (quoting Albemarle, 422 U.S. at 421). Title VII's remedial provisions are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible, requiring that persons aggrieved by discriminatory employment practices "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976). The

discretionary decision of the trial court regarding an award of back pay is reversible only for an abuse of the court's discretion. Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978).

As a broad proposition, injured parties are expected to mitigate the damage they suffer. This notion is expressed in Title VII in the following language: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. Section 2000e-5(g) (emphasis added).

"The backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." Albemarle Paper Co., 422 U.S. at 419. Under the NLRA, courts have long held that back pay is not to be awarded when the evidence shows a willful loss of earnings. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941). Developed from this general concept, the more specific acts which constitute such willful conduct are: failure to remain in the labor market, refusal to accept substantially equivalent employment, failure diligently to search for alternative work, or voluntarily quitting alternative employment without good reason. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2nd Cir. 1965), cert.denied, 384 U.S. 972 (1966).

United and ALPA had the burden of showing that Sangster could have mitigated her damages. Kaplan v. International Alliance of Theatrical Stage Employees, 525 F.2d at 1363. Sangster claims that United and ALPA failed to establish that there was substantially equivalent work available which, in the exercise of reasonable diligence, she could have obtained. See Sias v. City Demonstration Agency, 588 F.2d at 696. We disagree. Moreover, she admitted that she

knew of an in-flight supervisory position that had been available since 1970 for at least the last few years of her unemployment and that other United employees on similar circumstances had obtained jobs as stewardesses. Perhaps most important is Sangster's admission that she never even attempted to procure a job as a stewardess, the work she considered preferable to her position as stewardess supervisor. The evidence, from whatever sources, was more than sufficient to satisfy appellees' burden of showing that substantially equivalent work was available to Sangster.

Sangster's reliance on cases that hold that a plaintiff is not required to seek employment that is outside her area of residence, distasteful, essentially different, or inferior is misplaced. Apparently, her main reason for preferring the stewardess position to that of stewardess supervisor was that she could tailor her schedule to that of her pilot-husband. Certainly United was unjustified in denying her that opportunity solely on the basis of her sex and marital status. Nonetheless, Sangster was not entitled to remain idle for eight years after quitting substantially equivalent employment even if her right to seek employment with a different employer is given full recognition. We conclude that Sangster did not meet her duty to mitigate her damages, and that denial of back pay under the circumstances would not frustrate Title VII's remedial purposes. See DeLorean Cadillac, Inc. v. NLRB, 614 F.2d 554, 555 (6th Cir. 1980) (finding of reasonable diligence unsupported by record as a whole where based on uncorroborated testimony by discriminatee of his efforts to secure a job). Cf. Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), cert. denied, 435 U.S. 1007 (1978) (reasonable diligence on the part of two stewardesses, each unemployed for less than nine months, shown by credible

testimony); Sprogis v. United Air Lines, Inc., 517 F.2d 387 (7th Cir. 1975) (reasonable diligence after discriminatory discharge shown on the part of married stewardess by at least one formal application for employment and the procurement of a temporary two-month job during a two-year period of unemployment).

B. Attorneys' Fees

An award of attorneys' fees in a Title VII suit is within the broad discretion of the trial court and should be proportionate to the extent to which the plaintiff prevails in the suit. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1008 (9th Cir. 1972). The trial judge is in the best position to evaluate the complexity of the case as well as other relevant factors. We affirm the award of attorneys' fees in the amount set by the trial court, finding no abuse of discretion.

AFFIRMED.

FOOTNOTES

1/ The district court issued a written opinion reported at Sangster v. United Air Lines, Inc., 438 F.Supp. 1221 (N.D. Cal. 1977).

2/ As summarized by the court, the evidence showed:

> The plaintiff has testified that, with reference to the mitigation of damages in this case, which is the central and crucial issue, the plaintiff has testified that she reviewed classified ads for suitable jobs. However, there is no evidence that she made any calls with reference to her perusal of the classified ad section and we are talking of a period of almost 8 years from July 1969 to May 1977. Also that she applied as a cocktail waitress or restaurant hostess; the great majority of those, about 4 applications, made after she consulted her lawyer in December 1975, and only 2 before that time.
>
> She inquired by telephone only of 4 travel agencies regarding employment. She did not apply to other airlines and she did not register at any employment agency for work or with the state nor did she apply for benefits, all of this during the said 8-year period. (RT: 127-28)

The record bears out this summary. See RT: 54-67, 124.

3/ ALPA also contends that Sangster's claim was barred by the applicable state statute of limitations. This argument must fail. See Kirk v. Rockwell Int'l Corp., 578 F.2d 814, 819 (9th Cir. 1978). We also find no grounds for applying the equitable doctrine of laches to bar Sangster's claim. The considerable delay in filing her claim in district court was not an inexcusable lack of diligence in light of the facts that the EEOC did not inform Sangster of her right to sue and that she did not learn until some time in 1975 that she could sue without awaiting a final resolution by the EEOC. Cooper v. Bell, No. 78-2265, slip op. at 4845 (9th Cir. Aug. 21, 1980).

APPENDIX B

FILED
OCT 14 1977
WILLIAM L. WHITTAKER, CLERK

50

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINDA E. SANGSTER, an individual, Plaintiff, -vs- UNITED AIR LINES, INC., a Delaware corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization, Defendants.	No. C-76-2426 SC OPINION

Linda Sangster sues United Air Lines, Inc. (United), and the Air Lines Pilots Association, International (ALPA), a labor organization representing stewardesses, among others, charging both with unlawful sex discrimination in employment. 42 U.S.C. § 2000e-5. She seeks reinstatement to the position of stewardess with full seniority and benefits, backpay with interest, attorney fees and costs. The matter comes before the court on plaintiff's motion for partial summary judgment on the issues of liability and reinstatement with full seniority, and on ALPA's motion for summary judgment, or, in the alternative, to dismiss the complaint for lack of jurisdiction or failure to state a claim. United does not oppose plaintiff Sangster's motion except as to liability for monetary damages. All parties agree as to

Copies mailed to parties of Record

364

the material facts, though they sometimes differ as to the construction which should be placed on them.

FACTS

Plaintiff Sangster, then an unmarried woman, was employed by United Air Lines, Inc., as a stewardess or cabin attendant on November 24, 1961. On May 28, 1966, then still unmarried and thus eligible for continued flight duty, she accepted promotion to the non-flight position of stewardess supervisor. This change of status did not affect her seniority as a stewardess which continued to accrue in accordance with the provisions of the applicable collective bargaining agreement as though she were still on active stewardess service. Nor did it preclude a later return to stewardess status with full accrued seniority should she so choose.

On April 9, 1968, plaintiff Sangster married. She was aware that if she did so United's rules would bar her from resuming her former stewardess position, and that she would forfeit her stewardess seniority rights.[1/] Nevertheless, though her sole employment interest by then was to return to stewardess status, she decided to marry, to continue as a stewardess supervisor for the time being, and to await the outcome of negotiations between United and ALPA which she had reason to believe would soon terminate the "no-marriage" policy.

United and ALPA did reach such an agreement on November 7, 1968, and on November 8, 1968, Mrs. Sangster applied for transfer to stewardess status. But the agreement was only partia ly retroactive and it did not protect married stewardess supervisors in her circumstances. Following an announcement to that effect by ALPA and denial of her application by United, she instituted a complaint on November 9,1968, according to company grievance procedure. After ALPA twice refused United's suggestion that the agreement be further

FYI-Sandviken
3-15-73—10M—1000

365

extended to include married stewardess supervisors, she filed a charge of unlawful employment practices with the Equal Employment Opportunity Commission on February 6, 1969, at the suggestion of a United officer.

Plaintiff Sangster continued to work as a stewardess supervisor while her company grievance was pending, but quit United's employ on or about July 16, 1969, following its denial of her complaint on June 4, 1969. Mrs. Sangster's husband was and is a pilot for United; she desired to coordinate her schedule with his, an eventuality possible only by resuming flight status and conforming her work schedule to his (an outcome possible because of seniority preferences), or by quitting any conflicting job. Refused permission to fly, she quit her conflicting stewardess supervisor position.[2/]

At no time, however, did Mrs. Sangster ever discontinue her efforts to obtain redress through the EEOC. But burdened by its enormous backlog and by the complications caused by a spate of related cases,[3/] the EEOC did not find until March 8, 1972, that there was reasonable cause to believe that her charge was true, informing her then that it would begin conciliation efforts on her behalf "as soon as possible," and advising her that she would be kept informed of progress. Nothing more transpired until October 12, 1976, when the EEOC, after some prodding from Mrs. Sangster, notified her that it had been unable to reconcile her dispute, and that she had a right to sue. This action was filed nineteen days later on November 1, 1976.

It would appear that something more should have been done during this extended period, but the fault can be laid on no one party or organization. Mrs. Sangster could after six months have removed her claim from the EEOC and come into federal court for the relief she was seeking. However, she

366

only inadvertently learned of this option sometime in 1976, and she was under no legal obligation to bypass the EEOC in any case. Similarly, she could have pressed the EEOC for speedier action. But she is no more to blame for failing to do so than are United and ALPA, which also had means to force the issue and which, it may be assumed, had even greater interest in its outcome, being subject to a number of such charges. Again, the EEOC could have acted with greater dispatch, or, if unable to do so, could have informed all concerned of its incapacity and of the availability of other legal avenues. But to have done this it must in some sense have abdicated responsibility placed on it by Congress, which reiterated in 1972 its preference for resolution of these conflicts through the EEOC though fully aware of the EEOC's acute overload.[4/]

No policy or rule restricting employment as stewards to single males has ever been enforced by United. Its practice and policy of refusing to employ married persons as cabin attendants was applied solely to married women, as opposed to married men. United, as previously stated, did discontinue this policy on November 7, 1968, with respect to married women generally, but it continued to bar married stewardess supervisors from transfer to stewardess positions though all other stewardess supervisors were permitted to do so. As no parallel restriction was imposed on similarly situated male employees, the change of policy simply narrowed the sweep of United's prior sexually discriminatory policy; that policy continued in effect with respect to married female stewardess supervisors who sought flight positions as cabin attendants.[5/] To the extent that United's policy pertained only to job classifications as to which there may have been no

367

male counterpart, its marriage ban was not a bona fide occupational qualification.

The Air Line Pilots Association, International, shared in the maintenance of this practice and policy insofar as it affected Mrs. Sangster. Although its pressure and initiatives were responsible for the abandonment of the policy with respect to stewardesses (who were members of the union), it resisted for a time United's attempts to extend the same nondiscriminatory treatment to already married steward supervisors (who were members of management), notwithstanding contractual seniority rights afforded stewardess supervisors who were unmarried. As United's denial of Mrs. Sangster's application for transfer to stewardess status hinged on ALPA's opposition, its insistence on continuance of the discriminatory practice with respect to married stewardess supervisors renders it equally a cause of that denial, and an equal partner with United in the perpetuation of that discriminatory practice. 6/

The court finds that United and ALPA engaged in an unlawful discriminatory employment practice by refusing or preventing employment as stewardesses to married stewardess supervisors, in that this distinction discriminated on the basis of sex without any bona fide ground for such classification. The court further finds that United and ALPA concurred in the application of this unlawful discriminatory practice to Linda Sangster on November 8, 1968, when United denied Mrs. Sangster's application for transfer to stewardess status.

LAW

ALPA moves for summary judgment and opposes Mrs. Sangster's motion for partial summary judgment, contending that her claim under Title VII is barred because she did not

FYI-Sandstone
3-12-73—10M—1068

368

file her charge with the EEOC within the filing period then in effect. In the alternative, it moves to dismiss on the ground that the action was not filed in this court within the applicable California statute of limitations, or that she was guilty of laches.

A. Timeliness of EEOC Filing

The court has already twice rejected ALPA's contention that Mrs. Sangster's EEOC filing was untimely. But ALPA again renews its assertion, claiming as justification that the court did not then have the guidance of the Supreme Court in its decision in United Air Lines, Inc. v. Evans, supra, a case arising out of the same discriminatory policy. It asserts once more that the critical date triggering the filing period was April 9, 1968, the date of plaintiff's marriage, and not November 8, 1968, the date plaintiff's application for transfer to stewardess status in fact was denied. Lest there be doubt as to the basis of the court's ruling to the contrary, the court will consider the issue anew.

Although Evans had not been decided when the court issued its first order, the decision was considered by this court prior to its reconsideration of its order on June 28, 1977. The court reaffirmed that order because, among other reasons, Evans is not on point. Nor are the other cases now cited to the court by ALPA.

In Evans, the Supreme Court ruled that a complaint filed with the EEOC five years after the person aggrieved was discharged by United Air Lines, and one year after she was re-hired by United, though with no seniority, could not be regarded as having been brought within 90 days of a triggering discriminatory act. Neither the fact that she was treated less favorably than males hired after her termin-

FFI-Gaudelose
3-15-73—10M—1000

369

ation in 1968 and prior to her re-employment in 1972, and thus with less total service, nor the fact that the seniority system gave present effect to that past discriminatory practice, was adequate to constitute a present, continuing violation sufficient to render her EEOC filing timely.

This case is plainly distinguishable. Not only does it not raise a question of "continuing" violation, but, as the court has twice ruled, the actionable injury to Mrs. Sangster occurred when United denied her application for transfer. The court does not accept ALPA's contention that the denial of plaintiff's application for transfer was already a "fait accompli" on April 9, 1968, or that rejection of her application constituted no more than "crystallization" of an act of discrimination which automatically took place when plaintiff married. Although Mrs. Sangster was aware of United's policy when she married on April 9, 1968, and that her marriage would subject her to loss of stewardess seniority and eligibility for transfer to stewardess status, it did not in fact have that effect on her until she applied for transfer and was denied. ALFA's disingenuous sophistry cannot overcome the facts.

As the court previously ruled, it is the doing of an actual act of unlawful discrimination against a specific aggrieved person which makes it an unlawful employment practice proscribed by Title VII. Only when the deed is done can that aggrieved person be said to possess a cause of action, and thus only by its doing can the filing period be triggered. The prospect of its doing or the existence of a policy committing the doer to the doing is not sufficient, no matter how imminent or certain application of the policy to the aggrieved person may be. Unlawful employment practices, the court again states, do not float free in the air; they exist only when attached

to a particular person. A discriminatory policy does not become an unlawful discriminatory practice until a specific person has felt the sting of that policy. Indeed, unless a complaining party can show enforcement of the policy against him or her sufficient to provide standing, no suit thereon could be entertained.

Here, although plaintiff knew that she was considered by United to have forfeited her seniority and transfer rights on the day she married, United did not enforce its policy against her until November 8, 1968. Her cause of action accrued as of that date, and on that date the 90-day filing period began. Her filing with the EEOC, therefore, was timely.

B. Timeliness Under California Statutes of Limitation.

ALPA next contends that plaintiff's action, filed in this court on November 1, 1976, is barred by either of two analogous state statutes of limitations. ALPA argues that either the one-year tort liability statute, Cal. Civ. Proc. Code § 340(3), or the three-year statutory liability statute, id. § 338(1), will bar the action, since it was filed more than eight years after the cause of action accrued. See, e.g., Kirk v. Rockwell International Corp., 14 E.P.D (CCH) § 7,646 (C.D. Cal. 1977); Clayton v. McDonnell Douglas Corp., 13 F.E.P. Cas. (BNA) 451 (C.D. Cal. 1976), appeal dism'd on other grounds (9th Cir. 1977).

This contention was foreclosed by the Court of Appeals for the Ninth Circuit in Cunningham v. Litton Industries, 413 F.2d 887, 890-91 (9th Cir. 1969):

> We hold that the ... period within which suit may be filed in federal district court begins to run when the aggrieved party received notice of failure to effect voluntary compliance from the EEOC, regardless

FPI-Conference
3-29-79—10M—1000

376

> of the time the Commission has taken to process the charge.
>
> ....
>
> The statutory scheme of Sec. 706 [section 2000e-5] is thus fulfilled by allowing conciliation attempts to continue as long as they may appear fruitful, while at the same time giving either the aggrieved party or the respondent the right to precipitate the EEOC action of notification, which triggers the "statutory" period for filing suit....

See Cleveland v. Douglas Aircraft Co., 509 F.2d 1028 (9th Cir. 1975); Jefferson v. Peerless Pumps Hydronamic, 456 F. 2d 1359 (9th Cir. 1972).

There is nothing in Occidental Life Insurance Company of California v. EEOC, supra, which would render this rule less binding on the court. Insofar as the opinion has any applicability to this private action, Occidental Life disapproves mechanical importation of state statutes of limitations. It is important, the Court said, that resort to such statutes

> not frustrate or interfere with the implementation of national policies .... State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of [Title VII].

53 L.Ed.2d at 412.

As that national policy requires "employment discrimination claims ... [to] be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in federal court," id. at 412-13, it would hardly be appropriate to rely on a state statute of limitations here where plaintiff, perhaps to her present disadvantage, relied on EEOC efforts for eight years. Nothing in the Act explicitly requires the EEOC to conclude its conciliation efforts within

372

any maximum period of time, nor should state statutory limits be permitted to compel an aggrieved person to abandon this preferred procedure in favor of a private enforcement action. See id. at 407, 411-14.

Mrs. Sangster was notified by the EEOC on October 12, 1976, that conciliation efforts had failed. She filed civil suit in this court on November 1, 1976, well within any applicable federal period of limitations. In view of the Ninth Circuit's holding in Cunningham, this court cannot hold that any California statute of limitations bars the action. This contention, therefore, is rejected.

C. Laches.

ALPA finally contends that the action should be barred under the doctrine of laches. Cf. e.g., Fowler v. Blue Bell, Inc., 14 F.E.P. Cas. 1009, 1012 (N.D. Cal. 1976). ALPA claims prejudice to its members by reason of any reinstatement with seniority which might be ordered, and claims that Mrs. Sangster's failure to seek an earlier ruling from the EEOC that conciliation had failed was inexcusable lack of diligence.

Mrs. Sangster's reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

Nor would it be just to penalize Mrs. Sangster for delays as much attributable to ALPA, United and the EEOC as to her. Though without making a pest of herself she might have done more, so might have all concerned, and to visit the

FPI-Sandstone
3-19-73—10034—1004

373

entire burden of that fault on Mrs. Sangster alone would be unfair. EEOC's conciliation efforts, "regardless of the time taken," are designed to aid in effectuation of remedy. The court will not find that its procedure has in this instance prevented it. Franks v. Bowman Transportation Co., 424 U.S. 747, 778 (1976); Cunningham v. Litton Industries, supra.

Accordingly, the court grants partial summary judgment to Mrs. Sangster to the extent specified below, and denies all motions brought by ALPA.

Remedy

In considering the extent to which Mrs. Sangster is entitled to a remedy, the court is confronted with the problem of the proper weight to be attached to plaintiff's voluntary quitting of her job as a stewardess supervisor, and her failure to press the EEOC for speedy action on her complaint.

Clearly, it is the court's duty to render a decree which will so far as possible eliminate all the effects of the discrimination against her, responsibility for which is shared by United and ALPA. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975). But the court's obligation is to give compensation equal to the injury caused by these parties, no more and no less. Thus, the court questions whether a remedy which includes compensation in various possible forms for the period she voluntarily was not an employee of United is needed to make her "whole".

In answering, it is necessary to distinguish between United's refusal to give Mrs. Sangster the job she wanted and sought, that of stewardess, and the job she did not want and quit, that of stewardess supervisor. It seems obvious that United cannot insulate itself from nor set up a defense to a claim of unlawful refusal to hire as to one job, by offering an applicant therefor a second job which she does not want and

FPI-Sandviken
3-19-73—10286—1006

374

which differs in material aspects. See Franks v. Bowman Transportation Co., supra at 768-69. Such an offer may have relevance to issues of damages or mitigation, but it will not overcome the unlawfulness of its refusal to hire.

On the other hand, where an applicant is found to have given up his or her effort to secure the position from which he or she was unlawfully barred, the employer will not be held to have caused injuries flowing from that unlawful act; accordingly, the applicant will obtain no remedy. Gerstle v. Continental Airlines, Inc., supra; cf. United Air Lines v. Evans, supra.

Mrs. Sangster, therefore, must show by a preponderance of the evidence that her voluntary departure from her supervisory job did not amount to a voluntary abandonment of her claim to the stewardess position. She also must show that any injury for which she seeks compensation was a product of United and ALPA's unlawful discrimination, and not of her own voluntary actions.

The court finds that she has met the first of these burdens. The stewardess position differed materially from the supervisory position she occupied. Thus, she was not obligated to accept or retain that position in lieu of the position she was unlawfully denied. In fact, her decision to quit the supervisory job was provoked by one of the most material differences between that post and the stewardess position, namely the incompatibility of her supervisory work schedule with that of her husband. As at no time did she cease to seek employment by United as a stewardess, her quitting the supervisory position did not constitute abandonment of her efforts to obtain her lawful due.

But as to the second of her burdens, Mrs. Sangster has made a less convincing showing. The court, of course,

takes as its starting point a presumption in favor of rightful seniority relief, relief which may not be denied except on the basis of unusual facts and circumstances that would not generally be found in Title VII cases, or for reasons which "'if applied generally, would ... frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" Franks v. Bowman Transportation Co., supra at 771, 779 n. 41. Ordinarily, having shown the unlawfulness of United's refusal to permit her transfer, Mrs.Sangster would be entitled to be slotted in that position in the seniority system that would have been hers had she been permitted to transfer at the time of her application on November 8, 1968. Id. at 765-66.

However, an award of retroactive seniority is not requisite in all cases, but is subject to the court's sound equitable discretion. Id. at 770-71. Equitable remedies, as the Supreme Court pointed out, must be a "'special blend of what is necessary, what is fair, and what is workable ...'"; the court must "'eschew rigid absolutes and look to the practical realities and necessities inescapably involved ....'" Id. at 777 n. 39.

First of these practical realities is the fact that Mrs. Sangster quit United. Although in no sense can her right to recovery for denial of the stewardess position on November 8, 1968, be held contingent upon later retention of the supervisory job, it remains true that her right to the stewardess job and to full seniority contractually sprang from her possession of the supervisory position. When she gave up that post, therefore, she considerably weakened the strength and urgency of her claim by adding a second obstacle to the fact of her marriage. That this contributed to the extent of her

FPI-Sanderson
5-10-73—10034—1008

576

injury seems clear, since otherwise she would have been reinstated as a stewardess on October 16, 1969, when United and ALPA concluded an agreement which would have applied to her. Further, it indicated that she may have thereby intended to abandon her claim, an impression which, so far as the evidence shows, she did nothing to dispel. One may reasonably infer that this also contributed to the EEOC's slow handling of her charge, since it may well have believed her claim to have been dropped.

Secondly, Mrs. Sangster did not pursue her remedy with much vigor. She may have had a right to rely on the slow processes of the EEOC, a right which absolves her of any charge of neglect which would bar her claim from this court, but she was not entitled to sleep on that right. Even the best of procedures can sometimes go wrong, and it behooves a person who claims to be actively pressing for remedy of a grievance to periodically reassert that fact when nothing is heard from the accountable agency for lengthy periods, and to urge it to faster action. Mrs. Sangster's complacency in the face of an extraordinary passage of time is at least partly responsible for its duration.

But to take either of these facts as sufficient cause to reduce her remedy would be to state a rule which, "'if applied generally, would ... frustrate the central statutory purposes of eradicating discrimination through the economy and making persons whole for injuries suffered through past discrimination.'" Id. at 771, 779 n. 41.

If relief is to be limited in any significant measure in all instances where an employee quits one job after unlawfully being denied another job by the same employer, then the employee would be constrained either to contribute by his labor to an employer who has treated him unfairly and who persists

FYI-Sandstone
3-19-73—10016—1000

377

in that unfair treatment, or to take less than a whole remedy for injuries suffered. Again, to reduce a remedy unless the employee consents to serve his employer during the eleven years it may take, as here, to obtain that remedy, would force impossibly onerous choices on the employee and, because the employee's readiness to bring charges would be inhibited, the Act's purpose of ending economic discrimination would be frustrated.

Similarly, if a portion of the relief otherwise due is to be denied because the person aggrieved fails to seek his remedy with adequate industry, where the legally offending parties are equally culpable for that delay, and where a chief cause of the delay is reliance on proper and preferred process, then employers would obtain protection for persistence in unlawful action, and reliance on the Act would itself be found a buttress of economic discrimination.

Such rules cannot be abided. Accordingly, though it may seem bold to grant sixteen years' seniority where less than five were served, the court concludes that nothing less will do. Therefore, as United and ALPA by their mutual opposition to Mrs. Sangster's employment as a stewardess caused her an injury for which they are liable, injury which includes, in addition to denial of that position, loss of seniority which otherwise would have accrued, the court holds that Mrs. Sangster is entitled by way of relief to reinstatement in the position of stewardess with such seniority as would have been hers on November 8, 1968, had United's discriminatory policy never been in effect, plus full seniority credit for the period since that date to the present. It is so ordered.

No just reason for yet more delay appearing, partial summary judgment with respect to fewer than all the issues

FYI-Sandstone
3-19-73—10M—1808

shall be entered for Mrs. Sangster. Fed. R. Civ. P. 54(b). Judgment will be entered on the issues of liability and reinstatement with seniority in accordance with the order herein made, leaving for later resolution the issues of monetary damages, interest, and attorney fees.

Further, the court considers that this matter has been pending for an altogether inordinate length of time and, therefore, will entertain no application for stay of this order and judgment, but rather orders that Mrs. Sangster be reinstated with seniority forthwith. See Coffin v. Secretary of Health, Education and Welfare, 400 F. Supp. 953, 959 (D.D.C. 1975) (appeal pending).

Dated: October 19, 1977.

United States District Judge

379

FOOTNOTES

1/ Due to an administrative oversight, Mrs. Sangster continued to be carried on United's stewardess seniority list until February 20, 1969, when her name was removed because of her marriage.

2/ Ultimately, ALPA and United reached agreement on contract changes which would have permitted Mrs. Sangster's return to stewardess status. At the time she left United, however, Mrs. Sangster was not privy to the discussions then in prospect, and knew only, as she was informed by United's President Keck, that ALPA had twice refused United's proposal of an extension, that it was unwilling to discuss alteration of the policy further, but that further negotiations would begin July 15, 1969. ALPA and United were unable to agree on the terms of that extension until October 16, 1969, despite protestations now that both were fully in favor of it. As best Mrs. Sangster could discern when she decided to quit her supervisory job, prospects for change either through internal grievance machinery or by way of collective bargaining were dim.

3/ See, e.g., United Airlines,Inc. v. McDonald, 53 L. Ed 2d 423 (U.S., June 20, 1977); United Air Lines, Inc. v. Evans, 52 L. Ed 2d 571 (U.S., May 31, 1977); Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971); Lansdale v. United Air Lines, Inc., 437 F.2d 454 (5th Cir. 1971); Inda v. United Air Lines, 405 F.Supp. 426 (N.D. Cal. 1975); Kennedy v. Braniff, 403 F. Supp. 707 (N.D. Tex. 1975); Gerstle v. Continental Airlines, Inc., 5 E.P.D. (CCH) § 8,647 (D.Colo.1973); Romasanta v. United Air Lines, Inc., 6 E.P.D. (CCH) § 8,806 (N.D. Ill. 1972).

4/ Occidental Life Ins. Co. of California v. EEOC, 53 L.Ed 2d 402, 407 (1977).

5/ Nor did the United-ALPA agreement of October 16, 1969, which would have permitted Mrs. Sangster's transfer with full seniority had she then been with United as a stewardess supervisor, bring a full end to this discriminatory policy, but only further narrowed its impact, as by its terms the agreement applied only to former stewardesses then "currently in a stewardess management ... position." Thus, the policy continued to bar married stewardess supervisors who had left that position or otherwise failed to maintain continuous seniority, notwithstanding prior application for active stewardess service and continuous maintenance of efforts to obtain redress.

FPI-Sandstone
3-19-73—10M—1008

6/ Both United and ALPA continue to oppose Mrs. Sangster's reinstatement as a stewardess on the same terms as would have applied to other similarly situated stewardess supervisors. United is willing to reinstate Mrs. Sangster, and did so for one day on May 1, 1977, but is unwilling to pay any back wages. ALPA at one stage seemed willing to accept Mrs. Sangster's reinstatement, but it strenuously opposes reinstatement with full seniority.

381

FILED
OCT 14 1977
WILLIAM L WHITTAKER, CLERK

51

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINDA E. SANGSTER, an individual, Plaintiff, -vs- UNITED AIR LINES, INC., a Delaware corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization, Defendants.	No. C-76-2426 SC J U D G M E N T

It is hereby ordered, adjudged and decreed that plaintiff's motion for partial summary judgment on the issues of liability and reinstatement with full seniority is granted, and plaintiff shall be reinstated in the position of stewardess with such seniority as would have been hers on November 8, 1968, plus full seniority credit for the period since that date to the present.

No just reason for yet more delay appearing, partial summary judgment with respect to fewer than all the issues shall be entered for Mrs. Sangster. Fed. R. Civ. P. 54(b). Judgment will be entered on the issues of liability and reinstatement with seniority in accordance with the order herein made, leaving for later resolution the issues of monetary damages, interest, and attorney fees.

FFF-Sandstone
3-10-73—10M—1004

Copies mailed to parties of Record

387

Defendant Air Line Pilots Association's motion for summary judgment, or in the alternative to dismiss the complaint for lack of jurisdiction or failure to state a claim, is denied.

Dated: October 14, 1977.

United States District Judge

ENTERED IN CIVIL DOCKET Oct. 17 1977

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: HONORABLE SAMUEL CONTI, JUDGE

LINDA E. SANGSTER, an individial, Plaintiff,	)	
Vs.	)	C 76-2426 SC
UNITED AIR LINES, INC., a Delaware Corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization, Defendants.	)	

REPORTER'S TRANSCRIPT
(Partial)

November 7, 1977

REPORTED BY: BETTI A. MURRAY, C.S.R., R.P.R., C.P., C.M.

30a

A P P E A R A N C E S:

FOR THE PLAINTIFF:

Chickering & Gregory
3 Embarcadero Center
23rd Floor
San Francisco, Ca. 94111

By: ROBERT W. TOLLEN, ESQ.
and
D. WAYNE JEFFRIES, ESQ.

FOR THE DEFENDANT
UNITED AIRLINES:

Brobeck, Phleger & Harrison
One Market Plaza
San Francisco, Ca. 94105

By: DONALD D. CONNORS, JR., ESQ.

FOR THE DEFENDANT
ALPA:

HENNING & WALSH
Shell Bldg.
100 Bush St.
San Francisco, Ca. 94104

By: JOHN F. HENNING, JR., ESQ.
and
STEPHEN B. MOLDOF, ESQ.

MONDAY, NOVEMBER 7, 1977

THE COURT: All right. On the facts of this case, the second phase of the case, with reference to the back pay, duty to mitigate, inflation factor and attorneys' fees and amount, came on regularly for hearing on this date. The facts remain the same; that on November 8th, 1968, the plaintiff was denied transfer to a stewardess position; and on July 16, 1969, she quit her position with United as a stewardess supervisor, a position which paid more than the stewardess position she sought.

The Court has held that her quitting the supervisory post may not overcome the unlawfulness of the United's and ALPA's refusal to hire, although it may have some relevance to the issues of damages.

There is a strong policy favoring awards of back pay and the finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer; Albemarle Paper Company versus Moody, 422 US 405.

And the burden is on the defendants to prove unreasonable failure to mitigate. Once the gross amount of back pay owing is calculated, the burden shifts to the defendant to prove what should be deducted therefrom as interim earnings or amounts capable with reasonable diligence. Defendants' burden of proving lack of diligence is not satisfied merely by showing that there was -- that there were further actions which plaintiff could have taken in pursuit of the employment. Rather,

the defendant must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment.

The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct.

In addition, the defendant must show that the plaintif had she been diligent, she might have found employment and had some earnings.

And in seeking her work, plaintiff need not look outsi her own geographic area and for a time, need not accept work unrelated with her skills and interests. And it is Hornbook law that the rule is well settled that a discharged plaintiff is not bound to seek or accept other employment in a different locality in order to mitigate the damages.

Having that in mind and having the burden of proof that the plaintiff and the defendant -- having the burden of proof that the defendant must sustain, the Court is impressed with the following evidence:

The plaintiff has testified that, with reference to th mitigation of damages in this case, which is the central and crucial issue, the plaintiff has testified that she reviewed classified ads for suitable jobs. However, there is no evidenc that she made any calls with reference to her perusal of the classified ad section and we are talking of a period of almost

eight years from July 1969 to May, 1977. Also that she applied as a cocktail waitress or restaurant hostess; the great majority of those, about four applications, made after she consulted her lawyer in December of 1975, and only two before that time.

She inquired by telephone only of four travel agencies regarding employment. She did not apply to other airlines and she did not register at any employment agency for work or with the State nor did she apply for benefits, all of this during the said eight year period.

The plaintiff has no children; she's had ample time to seek other employment in mitigation and the Court finds that she wanted the position of flight attendant and that's all, and she did nothing in mitigation of damages for the eight year period. This plaintiff does not come anywhere near the minimum standards and her conduct was so deficient as to constitute an unreasonable failure to seek employment. She has an interest in one position only, and that was the interest that she had in being a stewardess, and with only one airline. And 'though the stewardess' position is highly unique and 'though the position of stewardess with zero seniority is a different one than with high seniority, her right to restrict her work search to her own profession and geographical area is not indefinite and there comes a time when she must so seek it and here her efforts were unreasonable.

Here we have a woman who is an intelligent, attractive,

34a

competent and capable young woman who was a flight attendant, a highly competent person who should not have had any trouble gaining employment if she had wanted it, but she only wanted to be a flight attendant and that's all, and her activities indicate she had no interest in any other position and the Court is impressed with the fact and finds, as a fact, that the plaintiff really was not interested in any other position during this time. She was not interested in seeking any employment that would in any way mitigate the damages that she alleged that she sustained.

There is a standard, even though the burden of proof is upon the defendant in cases such as this to show the unreasonable failure to mitigate, there still remains a standard of conduct on the part of the plaintiff which must be borne out by the plaintiff and that standard of conduct in this case was -- that was followed, was so deficient as to constitute an unreasonable failure to seek employment.

We are talking about an eight year period and the amount of contacts with the employment were -- all during this period-- deminimus (phonetic).

The Court then finds that the plaintiff did not mitigate her damages, has not sought to mitigate her damages, and, therefore, is not entitled to any recovery for back pay.

In a Federal tort claims case, the Ninth Circuit has held a little different standard with reference to attorneys' fees. The plaintiff, in a case of this type, is entitled to

attorneys' fees except in very unusual circumstances. And this issue is distinct from her entitlement to back pay.

The Supreme Court said, in the Albemarle case, that while Title VII appears to leave attorney fee awards in the District Court's discretion, the great public interest in having injunctive actions brought would be vindicated only if successful plaintiffs act as private attorney generals with awarded attorneys' fees in all but unusual circumstances.

The Ninth Circuit has held that the amount of the award should not be such as would discourage others from attacking discriminatory practices, but that it should be also a proportionate amount to which extent the plaintiff prevails. That's Schaffer (phonetic) versus San Diego Cabs, 462 Fed. 2d. 102, and within that framework, the Court's discretion is guided by the usual factors applying to awards of attorneys' fees.

In this case, the plaintiff's attorneys were successful in gaining the relief sought with reference to her back seniority They were successful in that regard. They were unsuccessful in the receiving of back pay and the Court, taking that into consideration together with, with reviewing the time schedule here, awards attorney fees in the sum of $5,537 plus costs.

Now, the Court, directing its attention now to the attorney for the defendants, I had told you at one time that the question of apportionment of attorneys' fees would be determined by the Court at a later date. Do you desire, at this

time, the Court to make an allocation of the award of attorneys' fees, or do you want to take that up between yourselves?

MR. CONNORS: I think we might try to take care of it between ourselves, unless Mr. Moldof disagrees.

MR. MOLDOF: I'm agreeable with that, Your Honor.

THE COURT: Just make the judgment against the defendants in the sum of $5,537; is that agreeable?

MR. CONNORS: Yes, we can fight it out some other place

THE COURT: Some other place than here, huh?

MR. CONNORS: Yes.

THE COURT: All right. Those are the findings of fact and conclusions of law of the Court and, counsel, will you prepare judgment in that regard and hand it in within the next few days?

Thank you, gentlemen.

******

37a

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 8, INCLUSIVE, CONSTITUTE A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

(SIGNED) Bettie O. Murray

Office-Supreme Court, U.S.
FILED
MAR 5 1981
ALEXANDER L. STEVAS,
CLERK

80-1520

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

LINDA E. SANGSTER,

PETITIONER,

v.

UNITED AIR LINES, INC., A DELAWARE CORPORATION, AND AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION,

RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert W. Tollen
Chickering & Gregory
Three Embarcadero Center
Twenty-Third Floor
San Francisco, California
Telephone: (415) 393-9000
Counsel for Petitioner

March 6, 1981

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

APPENDIX A

Opinion of the United States Court of Appeals, Ninth Circuit, entered December 8, 1980 ....1a

APPENDIX B

Opinion and judgment of the United States District Court for the Northern District of California, entered October 14, 1977 .....19a

APPENDIX C

Reporter's Transcript of the findings of fact and conclusions of law delivered from the bench by the United States District Court for the Northern District of California on November 7, 1977 .....63a

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405, (1975).....9a, 10a, 11a, 44a, 66a

Clayton v. McDonnell Douglas Corp., 13 F.E.P. Cas. (BNA) 451 (C D. Cal. 1976).....37a

Cleveland v. Douglas Aircraft Co., 509 F.2d 1028 (9th Cir. 1975).....38a

Coffin v. Secretary of Health, Education and Welfare, 400 F. Supp. 953 (D.D.C. 1975).....55a

Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975...57a

Cooper v. Bell, No. 78-2265, Slip Op. at 4845 (9th Cir. Aug. 21, 1980).....18a

Cunningham v. Litton Industries, 413 F.2d 887 (9th Cir. 1969).....37a, 40a 43a

DeLorean Cadillac, Inc. v. NLRB, 614 F.2d 554 (6th Cir. 1980).....15a

Fowler v. Blue Bell, Inc., 14 F.E.P. Cas. 1009 (N.D. Cal. 1976).....41a

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)... ..10a, 43a 45a, 48a

Gerstle v. Continental Airlines, Inc., 5 E.P.D. (CCH) §§ 8647 (D. Colo. 1973).....45a, 58a

Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), cert. denied, 435 U.S. 1007 (1978).....15a, 58a

Jefferson v. Peerless Pumps Hydronamic, 456 F.2d 1359 (9th Cir. 1972).....38a

Kaplan v. International Alliance of Theatrical Stage Employees, 525 F.2d 1354 (9th Cir. 1975).....9a, 12a

Kennedy v. Braniff, 403 F. Supp. 707 (N.D. Cal. 1975).....58a

Kirk v. Rockwell International Corp., 578 F.2d 814 (9th Cir. 1978).....18a, 37a

Lansdale v. United Air Lines, Inc., 437 F.2d 454 (5th Cir. 1971).....58a

Mahroom v. Hook, 563 F.2d 1369, (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978).....8a

NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2nd Cir. 1965), cert. denied, 384 U.S. 972 (1966).....12a

Occidental Life Insurance Company of California v. EEOC, 43 U.S. 355.....39a, 58a

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).....11a

Romasanta v. United Airlines, Inc., 6 E.P.D. (CCH) §§ 8806 (N.D. Ill. 1972).....58a

Sangster v. United Air Lines, Inc., 438 F. Supp. 1221 (N.D. Cal. 1977).....17a

Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, (9th Cir. 1972).....16a, 73a

Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978).....10a, 13a

Sprogis v. United Air Lines, Inc., 517 F.2d 387 (7th Cir. 1975)..... .15a, 58a

United Air Lines Inc. v. Evans,
431 U.S. 553 (1977).....31a, 32a,
45a, 57a

United Air Lines, Inc. v.
McDonald, 432 U.S. 385
(1977).....57a

Statutes

Cal. Civ. Proc. Code
§§ 340(3).....36a
§§ 338(1).....36a

Civil Rights Act of 1964
42 U.S.C. §§ 2000e-5.....2a, 11a
20a

Federal Rules of Civil Procedure
Rule 54(b).....55a, 61a

APPENDIX A

[Filed December 8, 1980
Richard H. Deane
Clerk, U.S. Court of Appeals]

NO. 78-1242, 78-1289
D.C. No. CV 76-2426 SC

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINDA E. SANGSTER, an individual,

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC., A DELAWARE CORPORATION, AND AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION,

Defendants-Appellees.

OPINION

Appeal from the United States District Court for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and Submitted August 13, 1980

Before: WRIGHT, GOODWIN and ALARCON, Circuit Judges.
ALARCON, Circuit Judge:

This is an employment discrimination case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. Linda E. Sangster, a former airline stewardess, alleged that her employer, United Air Lines, Inc. (United), and her collective bargaining agent, the Air Line Pilots Association (ALPA) had discriminated against her on the basis of her sex. ALPA appeals on No. 78-1242 from the district court order granting Sangster's motion for pretrial summary judgment on the issue of liability and ordering her reinstatement with full senority.[1] Sangster appeals in No. 78-1289 from the subsequent judgment denying her an award of back pay and awarding attorneys' fees. We affirm the district court in all respects.

FACTS

Sangster was hired by United on November 24, 1961 as an airline stewardess or flight attendant. She was unmarried at that time. On May 28, 1966 she was promoted to the nonflight position of stewardess supervisor. This change in status did not affect her seniority as a stewardess, which continued to accrue in accordance with the provisions of the applicable collective bargaining agreement as though she were still in active stewardess service. The transfer did not preclude a later return to her position as stewardess with full accrued seniority.

On April 9, 1968 Sangster married a United pilot. She was aware that once married United's rules would bar her from resuming her former stewardess

position and that she would forfeit her stewardess seniority rights. Nevertheless, she decided to continue in her employment as a stewardess supervisor after her marriage and to await the outcome of negotiations between United and ALPA, which she hoped would soon terminate the no-marriage policy.

United and ALPA did reach such an agreement on November 7, 1968. The agreement was only partially retroactive, however, and did not protect married stewardess supervisors who wished to transfer back to a flight position. When Sangster applied for transfer to stewardess status on November 8, 1968, United denied her application. The next day she filed a formal complaint under United's internal grievance procedure, and on February 6, 1969, she filed a

charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Her grievance complaint was denied by United on June 4, 1969. On June 16th Sangster quit her employment with United.

On March 8, 1972 the EEOC found reasonable cause to believe that Sangster's charge of discrimination was well-founded. On October 12, 1976 the EEOC informed her that the dispute could right to sue. On November 1, 1976 Sangster filed her complaint in district court seeking reinstatement with full seniority, back pay and attorneys' fees.

The court granted Sangster's motion for pretrial summary judgment on the issue of liability and ordered Sangster reinstated with full seniority.

A trial was held on the issues of back pay and attorneys' fees. At the trial, Sangster testified as to her efforts to seek alternative employment. She had remained unemployed for the eight years between the day she voluntarily quit her job and the time United was ordered to restore her to her position as stewardess with full seniority. She admitted that she did not seek work with another airline after leaving United, either as a stewardess or in a supervisory or other capacity. Her efforts at obtaining other positions were minimal.[2/] Sangster testified that the stewardess position at United with her seniority intact was a unique position, enabling her to adapt her schedule to her pilot-husband's while being assigned to the same geographic area.

The district court found that Sangster was not interested in any other position during her eight-year period of unemployment and that she had not exercised reasonable diligence in obtaining substantially equivalent employment. Concluding that she had not met her obligation to mitigate her damages, and therefore was not entitled to compensation for the period of her unemployment, the court denied Sangster's request for back pay. The court awarded attorneys' fees against the defendants of $5,537.00, an amount substantially below the requested sum.

ALPA's APPEAL

ALPA contends that Sangster failed to file her charge of employment discrimination with the EEOC in a timely fashion. We find no merit in ALPA's

contention that the 90-day filing period commenced on the date of Sangster's marriage. In light of the remedial policies behind Title VII, we refuse to give the strained interpretation urged by ALPA as to when Sangster's right of action accrued and thus to deny her redress. See Mahroom v. Hook, 563 F.2d 1369, 1375 (9th Cir. 1977), cert denied, 436 U.S. 904 (1978). It was not until Sangster attempted to transfer to a stewardess position on November 8, 1968 and felt the impact of the discriminatory transfer rule that the filing time began to run. Therefore, Sangster's charge filed on February 6, 1969 was timely filed.[3/]

SANGSTER'S APPEAL

A. Back Pay

An award of back pay in employment discrimination cases is one of the weapons in a court's arsenal to effectuate the dual purposes of Title VII. (1) to end discriminatory employment practices; and (2) to make employees whole for injuries suffered on account of unlawful employment discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). A finding of unlawful discrimination requires an award of back pay unless reasons exist "which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Kaplan v. International Alliance

of Theatrical Stage Employees, 525 F.2d 1354, 1363 (9th Cir. 1975) (quoting Albemarle 422 U.S. at 421). Title VII's remedial provisions are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible, requiring that persons aggrieved by discriminatory employment practices "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976). The discretionary decision of the trial court regarding an award of back pay is reversible only for an abuse of the court's discretion. Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978).

As a broad proposition, injured parties are expected to mitigate the damage they suffer. This notion is expressed in Title VII in the following language: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. Section 2000e-5(g) (emphasis added).

"The backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." Albemarle Paper Co., 422 U.S. at 419. Under the NLRA, courts have long held that back pay is not to be awarded when the evidence shows a willful loss of earnings. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941). Developed from this general

concept, the more specific acts which constitute such willful conduct are: failure to remain in the labor market, refusal to accept substantially equivalent employment, failure diligently to search for alternative work, or voluntarily quitting alternative employment without good reason. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2nd Cir. 1965), cert. denied, 384 U.S. 972 (1966).

United and ALPA had the burden of showing that Sangster could have mitigated her damages. Kaplan v. International Alliance of Theatrical Stage Employees, 525 F.2d at 1363. Sangster claims that United and ALPA failed to establish that there was substantially equivalent work available which, in the exercise of reasonable

diligence, she could have obtained. See Sias v. City Demonstration Agency, 588 F.2d at 696. We disagree. Moreover, she admitted that she knew of an in-flight supervisory position that had been available since 1970 for at least the last few years of her unemployment and that other United employees on similar circumstances had obtained jobs as stewardesses. Perhaps most important is Sangster's admission that she never even attempted to procure a job as a stewardess, the work she considered preferable to her position as stewardess supervisor. The evidence, from whatever sources, was more than sufficient to satisfy appellees' burden of showing that substantially equivalent work was available to Sangster.

Sangster's reliance on cases that hold that a plaintiff is not required to seek employment that is outside her area of residence, distasteful, essentially different, or inferior is misplaced. Apparently, her main reason for preferring the stewardess position to that of stewardess supervisor was that she could tailor her schedule to that of her pilot-husband. Certainly United was unjustified in denying her that opportunity solely on the basis of her sex and marital status. Nonetheless, Sangster was not entitled to remain idle for eight years after quitting substantially equivalent employment even if her right to seek employment with a different employer is given full recognition. We conclude that Sangster did not meet her duty to mitigate her

damages, and that denial of back pay under the circumstances would not frustrate Title VII's remedial purposes. See DeLorean Cadillac, Inc. v. NLRB, 614 F.2d 554, 555 (6th Cir. 1980) (finding of reasonable diligence unsupported by record as a whole where based on uncorroborated testimony by discriminatee of his efforts to secure a job). Cf. Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), cert.denied, 435 U.S. 1007 (1978) (reasonable diligence on the part of two stewardesses, each unemployed for less than nine months, shown by credible testimony); Sprogis v. United Air Lines, Inc., 517 F. 2d 387 (7th Cir. 1975) (reasonable diligence after discriminatory discharge shown on the part of married stewardess by at least one formal application for

employment and the procurement of a temporary two-month job during a two-year period of unemployment).

B. Attorneys' Fees

An award of attorneys' fees in a Title VII suit is within the broad discretion of the trial court and should be proportionate to the extent to which the plaintiff prevails in the suit. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1008 (9th Cir. 1972). The trial judge is in the best position to evaluate the complexity of the case as well as other relevant factors. We affirm the award of attorneys' fees in the amount set by the trial court, finding no abuse of discretion.

AFFIRMED.

FOOTNOTES

1/ The district court issued a written opinion reproted at Sangster v. United Air Lines, Inc., 438 F. Supp 1221 (N.D. Cal. 1977).

2/ As summarized by the court, the evidence showed:

> The plaintiff has testified that, with reference to the mitigation of damages in this case, which is the central and crucial issue, the plaintiff has testified that she reviewed classified ads for suitable jobs. However, there is no evidence that she made any calls with reference to her perusal of the classified ad section and we are talking of a period of almost 8 years from July 1969 to May 1977. Also that she applied as a cocktail waitress or restaurant hostess; the great majority of those, about 4 applications, made after she consulted her lawyer in December 1975, and only 2 before that time.
>
> She inquired by telephone only of 4 travel agencies regarding employment. She did not apply to other airlines and she did not register at any employment agency for work or with the state nor did she apply for benefits, all of this during the said 8-year period. (RT: 127-28)

The record bears out this summary. See RT: 54-67, 124.

3/ ALPA also contends that Sangster's claim was barred by the applicable state statute of limitations. This argument must fail. See Kirk v. Rockwell Int'l Corp., 578 F.2d 814, 819 (9th Cir. 1978). We also find no grounds for applying the equitable doctrine of laches to bar Sangster's claim. The considerable delay in filing her claim in district court was not an inexcusable lack of diligence in light of the facts that the EEOC did not inform Sangster of her right to sue and that she did not learn until some time in 1975 that she could sue without awaiting a final resolution by the EEOC. Cooper v. Bell, No. 78-2265, slip op. at 4845 (9th Cir. Aug. 21, 1980).

APPENDIX B

[Filed October 14, 1977
William L. Whittaker, Clerk]

No. C-76-2426 SC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINDA E. SANGSTER,	)
	)
PETITIONER,	)
	)
v.	)
	)
UNITED AIR LINES, INC., A DELAWARE CORPORATION, AND AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION,	)
	)
RESPONDENTS.	)

OPINION

Linda Sangster sues United Air Lines, Inc. (United), and the Air Lines Pilots Association, Internatinal (ALPA), a labor organization representing stewardesses, among others, charging both with unlawful sex discrimination in

employment. 42 U.S.C. § 2000e-5. She seeks reinstatement to the position of stewardess with full seniority and benefits, back pay with interest, attorney fees and costs. The matter comes before the court on plaintiff's motion for partial summary judgment on the issues of liability and reinstatement with full seniority, and on ALPA's motion for a summary judgment, or, in the alternative, to dismiss the complaint for lack of jurisdiction or failure to state a claim. United does not oppose plaintiff Sangster's motion except as to liability for monetary damages. All parties agree as to the material facts, though they sometimes differ as to the construction which should be placed on them.

FACTS

Plaintiff Sangster, then an unmarried woman, was employed by United Air Lines, Inc., as a stewardess or cabin attendant on November 24, 1961. On May 28, 1966, then still unmarried and thus eligible for continued flight duty, she accepted promotion to the non-flight position of stewardess supervisor. This change of status did not affect her seniority as a stewardess which continued to accrue in accordance with the provisions of the applicable collective bargaining agreement as though she were still on active stewardess service. Nor did it preclude a later return to stewardess status with full accrued seniority should she so choose.

On April 9, 1968, plaintiff Sangster married. She was aware that if she did so United's rules would bar her from resuming her former stewardess position, and that she would forfeit her stewardess seniority rights.[1/] Nevertheless, though her sole employment interest by then was to return to stewardess status, she decided to marry, to continue as a stewardess supervisor for the time being, and to await the outcome of negotiations between United and ALPA which she had reason to believe would soon terminate the "no-marriage" policy.

United and ALPA did reach such an agreement on November 7, 1968, and on November 8, 1968, Mrs. Sangster applied for transfer to stewardess status. But the agreement was only partially retroactive and it did not protect married

stewardess supervisors in her circumstances. Following an announcement to that effect by ALPA and denial of her application by United, she instituted a complaint on November 9, 1968, according to company grievance procedure. After ALPA twice refused United's suggestion that the agreement be further extended to include married stewardess supervisors, she filed a charge of unlawful employment practices with the Equal Employment Opportunity Commission on February 6, 1969, at the suggestion of a United officer.

Plaintiff Sangster continued to work as a stewardess supervisor while her company grievance was pending, but quit United's employ on or about July 16, 1969, following its denial of her complaint on June 4, 1969. Mrs.

Sangster's husband was and is a pilot for United; she desired to coordinate her schedule with his, an eventuality possible only by resuming flight status and conforming her work schedule to his (an outcome possible because of seniority preferences), or by quitting any conflicting job. Refused permission to fly, she quit her conflicting stewardess supervisor position.[2/]

At no time, however, did Mrs. Sangster ever discontinue her efforts to obtain redress through the EEOC. But burdened by its enormous backlog and by the complications caused by a spate of related cases,[3/] the EEOC did not find until March 8, 1972, that there was reasonable cause to believe that her charge was true, informing her then that it would begin conciliation efforts on her

behalf "as soon as possible," and advising her that she would be kept informed of progress. Nothing more transpired until October 12, 1976, when the EEOC, after some prodding from Mrs. Sangster, notified her that it had been unable to reconcile her dispute, and that she had a right to sue. This action was filed nineteen days later on November 1, 1976.

It would appear that something should have been done during this extended period, but the fault can be laid on no one party or organization. Mrs. Sangster could after six months have removed her claim from the EEOC and come into federal court for the relief she was seeking. However, she only inadvertently learned of this option sometime in 1976, and she was under no legal obligation to bypass the EEOC in any

case. Similarly, she could have pressed the EEOC for speedier action. But she is no more to blame for failing to do so than are United and ALPA, which also had means to force the issue and which, it may be assumed, had even greater interest in its outcome, being subject to a number of such charges. Again, the EEOC could have acted with greater dispatch, or, if unable to do so, could have informed all concerned of its incapacity and of the availability of other legal avenues. But to have done this it must in some sense have abdicated responsibility placed on its by Congress, which reiterated in 1972 its preference for resolution of these conflicts through the EEOC though fully aware of the EEOC's acute overload.[4/]

No policy or rule restricting employment as stewards to single males has ever been enforced by United. Its practice and policy of refusing to employ married persons as cabin attendants was applied soley to married women, as opposed to married men. United, as previously stated, did discontinue this policy on November 7, 1968, with respect to married women generally, but it continued to bar married stewardess supervisors from transfer to stewardess positions though all other stewardess supervisors were permitted to do so. As no parallel restriction was imposed on similarly situated male employees, the change of policy simply narrowed the sweep of United's prior sexually discriminatory policy; that policy continued in effect with respect to married

female stewardess supervisors who sought flight positions as cabin attendants.[5/] To the extent that United's policy pertained only to job classifications as to which there may have been no male counterpart, its marriage ban was not a bona fide occupational qualification.

The Air Line Pilots Association, International, shared in the maintenance of this practice and policy insofar as it affected Mrs. Sangster. Although its pressure and initiatives were responsible for the abandonment of the policy with respect to stewardesses (who were members of the union), it resisted for a time United's attempts to extend the same nondiscriminatory treatment to already married steward supervisors (who were members of

the management), notwithstanding contractual seniority rights afforded stewardess supervisors who were unmarried. As United's denial of Mrs. Sangster's application for transfer to stewardess status hinged on ALPA's opposition, its insistence on continuance of the discriminatory practice with respect to married stewardess supervisors renders it equally a cause of that denial, and an equal partner with United in the perpetuation of the discriminatory practice.[6/]

The court finds that United and ALPA engaged in an unlawful discriminatory employment practice by refusing or preventing employment as stewardesses to married stewardess supervisors, in that this distinction discriminated on the basis of sex without any bona fide

ground for such classification. The court futher finds that United and ALPA concurred in the application of this unlawful discriminatory practice to Linda Sangster on November 8, 1968, when United denied Mrs. Sangster's application for transfer to stewardess status.

LAW

ALPA moves for summary judgment and opposes Mrs. Sangster's motion for partial summary judgment, contending that her claim under Title VII is barred because she did not file her charge with the EEOC within the filing period then in effect. In the alternative, it moves to dismiss on the ground that the action was not filed in this court within the applicable California statute of limitations, or that she was guilty of laches.

A. Timeliness of EEOC Filing.

The court has already twice rejected ALPA's contention that Mrs. Sangster's EEOC filing was untimely. But ALPA again renews its assertion, claiming as justification that the court did not then have the guidance of the Supreme Court in its decision in United Air Lines, Inc v. Evans, supra, a case arising out of the same discriminatory policy. It asserts once more that the critical date triggering the filing period was April 9, 1968, the date of plaintiff's marriage, and not November 8, 1968, the date plaintiff's application for transfer to stewardess status in fact was denied. Lest there be doubt as to the basis of the court's ruling to the contrary, the court will consider the issue anew.

Although Evans had not been decided when the court issued its first order, the decision was consdidered by this court prior to its reconsideration of its order on June 28, 1977. The court reaffirmed that order because, among other reasons, Evans is not on point. Nor are the other cases now cited to the court by ALPA.

In Evans, the Supreme Court ruled that a complaint filed with the EEOC five years after the person aggrieved was discharged by United Air Lines, and one year after she was rehired by United, though with no seniority, could not be regarded as having been brought within 90 days of a triggering discriminatory act. Neither the fact that she was treated less favorably than males hired after her termination

in 1968 and prior to her re-employment in 1972, and thus with less total service, nor the fact that the seniority system gave present effect to that past discriminatory practice, was adequate to constitute a present, continuing violation sufficient to render her EEOC filing timely.

This case is plainly distinguishable. Not only does it not raise a question of "continuing" violation, but, as the court has twice ruled, the actionable injury to Mrs. Sangster occurred when United denied her application for transfer. The court does not accept ALPA's contention that the denial of plaintiff's application for transfer was already a "fait accompli" on April 9, 1968, or that rejection of her application constituted no more than

"crystallization" of an act of discrimination which automatically took place when plaintiff married. Although Mrs. Sangster was aware of United's policy when she married on April 9, 1968, and that her marriage would subject her to loss of stewardess seniority and eligibility for transfer to stewardess status, it did not in fact have that effect on her until she applied for transfer and was denied. ALPA's disingenuous sophistry cannot overcome the facts.

As the court previously ruled, it is the doing of an actual act of unlawful discrimination against a specific aggrieved person which makes it an unlawful employment practice proscribed by Title VII. Only when the deed is done can that aggrieved person be said to possess a cause of action, and thus only

by its doing can the filing period be triggered. The prospect of its doing or the existence of a policy committing the doer to the doing is not sufficient, no matter how imminent or certain application of the policy to the aggrieved person may be. Unlawful employment practices, the court again states, do not float free in the air; they exist only when attached to a particular person. A discriminatory policy does not become an unlawful discriminatory practice until a specific person has felt the sting of that policy. Indeed, unless a complaining party can show enforcement of the policy against him or her sufficient to provide standing, no suit thereon could be entertained.

Here, although plaintiff knew that she was considered by United to

have forfeited her seniority and transfer rights on the day she married, United did not enforce its policy against her until November 8, 1968. Her cause of action accrued as of that date, and on that date the 90-day filing period began. Her filing with the EEOC, therefore, was timely.

B. Timeliness Under California Statutes of Limitation.

ALPA next contends that plaintiff's action, filed in this court on November 1, 1976, is barred by either of two analogous state statutes of limitations. ALPA argues that either the one-year tort liability statute, Cal. Civ. Proc. Code § 340(3), or the three-year statutory liability statute, id., § 338(1), will bar the action since it was filed more than eight years after the cause of action accrued. See, e.g.,

Kirk v. Rockwell International Corp., 14 E.P.D. (CCH) § 7 646 (C.D. Cal. 1977); Clayton v. McDonnel Douglas Corp., 13 F.E.P. Cas. (BNA) 451 (C.D. Cal. 1976), appeal dism'd on other grounds (9th Cir. 1977).

This contention was foreclosed by the Court of Appeals for the Ninth Circuit in Cunningham v. Litton Industies, 413 F.2d 887, 890-91 (9th Cir. 1969):

> We hold that the ... period within which suit may be filed in federal district court begins to run when the aggrieved party received notice of failure to effect voluntary compliance from EEOC, regardless of the time the Commission has taken to process the charge.

...

> The statutory scheme of Sec. 706 [section 2000e-5] is thus fulfilled by allowing conciliation attempts to continue as long as they may appear fruitful, while at the same time giving either the aggrieved party or the respondent the right to precipitate the EEOC action of notification, which triggers the "statutory" period for filing suit ...

See Cleveland v. Douglass Aircraft Co., 509 F.2d 1028 (9th Cir. 1975); Jefferson v. Peerless Pumps Hydronamic, 4567 F.2d 1359 (9th Cir. 1972).

There is nothing in Occidental Life Insurance Company of California v.

EEOC supra, which would render this rule less binding on the court. Insofar as the opinion has any applicability to this private action, Occidental Life disapproves mechanical importation of state statutes of limitations. It is important, the Court said, that resort to such statutes

> not frustrate or interfere with the implementation of national policies ... State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of [Title VII].

53 L.Ed.2d at 412.

As that national policy requires "employment discrimination claims ... [to] be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in federal court," id. at 412-13, it would hardly be appropriate to rely on a state

statute of limitations here where plaintiff, perhaps to her present disadvantage, relied on EEOC efforts for eight years. Nothing in the Act explicitly requires the EEOC to conclude its conciliation efforts within any maximum period of time, nor should state statutory limits be permitted to compel an aggrieved person to abandon this preferred procedure in favor of a private enforcement action. See id. at 407, 411-414.

Mrs. Sangster was notified by the EEOC on October 12, 1976, that conciliation efforts had failed. She filed civil suit in this court on November 1, 1976, well within any applicable federal period of limitations. In view of the Ninth Circuit's holding in Cunningham, this court cannot hold that any

California statute of limitations bars the action. This contention, therefore, is rejected.

C. Laches.

ALPA finally contends that the action should be barred under the doctrine of laches. Cf. e.g., Fowler v. Blue Bell, Inc., 14 F.E.P. Cas. 1009, 1012 (N.D. Cal. 1976). ALPA claims prejudice to its members by reason of any reinstatement with seniority which might be ordered, and claims that Mrs. Sangster's failure to seek an earlier ruling from the EEOC that conciliation had failed was inexcusable lack of diligence.

Mrs. Sangster's reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the

strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

Nor would it be just to penalize Mrs. Sangster for delays, as much attributable to ALPA, United and the EEOC as to her. Though without making a pest of herself she might have done more, so might have all concerned, and to visit the entire burden of the fault on Mrs. Sangster alone would be unfair. EEOC's conciliation efforts, "regardless of the time taken," are designed to aid in effectuation of remedy. The court will not find that its

procedure has in this instance prevented it. Franks v. Bowman Transportation Co., 424 U.S. 747, 778 (1976); Cunningham v. Litton Industries, supra.

Accordingly, the court grants partial summary judgment to Mrs. Sangster to the extent specified below, and denies all motions brought by ALPA.

Remedy

In considering the extent to which Mrs. Sangster is entitled to a remedy, the court is confronted with the problem of the proper weight to be attached to plaintiff's voluntary quitting of her job as a stewardess supervisor, and her failure to press the EEOC for speedy action on her complaint.

Clearly, it is the court's duty to render a decree which will so far as possible eliminate all the

effects of the discrimination against her, responsibility for which is shared by United and ALPA. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975). But the court's obligation is to give compensation equal to the injury caused by these parties, no more and no less. Thus, the court questions whether a remedy which includes compensation in various possible forms for the period she voluntarily was not an employee of United is needed to make her "whole".

In answering, it is necessary to distinguish between United's refusal to give Mrs. Sangster the job she wanted and sought, that of stewardess, and the job she did not want and quit, that of stewardess supervisor. It seems obvious that United cannot insulate itself from nor set up a defense to a claim of

unlawful refusal to hire as to one job, by offering an applicant therefor a second job which she does not want and which differs in material aspects. See Franks v. Bowman Transportation Co., supra at 768-69. Such an offer may have relevance to issues of damages or mitigation, but it will not overcome the unlawfulness of its refusal to hire.

On the other hand, where an applicant is found to have given up his or her effort to secure the position from which he or she was unlawfully barred, the employer will not be held to have caused injuries flowing from that unlawful act; accordingly, the applicant will obtain no remedy. Gerstle v. Continental Airlines, Inc., supra; cf. United Airlines v. Evans, supra.

Mrs. Sangster, therefore, must show by a preponderance of the evidence that her voluntary departure from her supervisory job did not amount to a voluntary abandonment of her claim to the stewardess position. She also must show that any injury for which she seeks compensation was a product of United and ALPA's unlawful discrimination, and not of her own voluntary actions.

The court finds that she has met the first of these burdens. The stewardess position differed materially from the supervisory position she occupied. Thus, she was not obligated to accept or retain that position in lieu of the position she was unlawfully denied. In fact, her decision to quit the supervisory job was provoked by one of the most material differences between

that post and the stewardess position, namely the incompatibility of her supervisory work schedule with that of her husband. As at no time did she cease to seek employment by United as a stewardess, her quitting the supervisory position did not constitute abandonment of her efforts to obtain her lawful due.

But as to the second of her burdens, Mrs. Sangster has made a less convincing showing. The court, of course, takes as a starting point a presumption in favor of rightful seniority relief, relief which may not be denied except on the basis of unusual facts and circumstances that would not generally be found in Title VII cases, or for reasons which "'if applied generally, would ... frustrate the central statutory purposes of eradicating discrimination

throughout the economy and making persons whole for injuries suffered through past discrimination.'" Franks v. Bowman Transportation Co., supra at 771, 779 n. 41. Ordinarily, having shown the unlawfulness of United's refusal to permit her transfer, Mrs. Sangster would be entitled to be slotted in that position in the seniority system that would have been hers had she been permitted to transfer at the time of her application on November 8, 1968. Id. at 765-66.

However, an award of retroactive seniority is not requisite in all cases, but is subject to the court's sound equitable discretion. Id. at 770-71. Equitable remedies, as the Supreme Court pointed out, must be a "'special blend of what is necessary, what is fair, and what is workable ...'"; the

court must "'eschew rigid absolutes and look to the practical realities and necessities inescapably involved ....'" Id. at 777 n. 39.

First of these practical realities is the fact that Mrs. Sangster quit United. Although in no sense can her right to recovery for denial of the stewardess position on November 8, 1968, be held contingent upon later retention of the supervisory job, it remains true that her right to the stewardess job and to full seniority contratually sprang from her possession of the supervisory positon. When she gve up that post, therefore, she considerably weakened the strength and urgency of her claim by adding a second obstacle to the fact of her marriage. That this contributed to the extent of her injury seems clear,

since otherwise she would have been reinstated as a stewardess on October 16, 1969, when United and ALPA concluded an agreement which would have applied to her. Further, it indicated that she may have thereby intended to abandon her claim, an impression which, so far as the evidence shows, she did nothing to dispel. One may reasonably infer that this also contributed to the EEOC's slow handling of her charge, since it may well have believed her claim to have been dropped.

Secondly, Mrs. Sangster did not pursue her remedy with much vigor. She may have had a right to rely on the slow processes of the EEOC, a right which absolves her of any charge of neglect which would bar her claim from this court, but she was not entitled to

sleep on that right. Even the best of procedures can sometimes go wrong, and it behooves a person who claims to be actively pressing for remedy of a grievance to periodically reassert that fact when nothing is heard from the accountable agency for lengthy periods, and to urge it to faster action. Mrs. Sangster's complacency in the face of an extraordinary passage of time is at least partly responsible for its duration.

But to take either of these facts as sufficient cause to reduce her remedy would be to state a rule which, "'if applied generally, would ... frustrate the central statutory purposes of eradicating discrimination through the economy and making persons whole for injuries suffered through past

discrimination.'" Id. at 771, 779 n. 41.

If relief is to be limited in any significant measure in all instances where an employee quits one job after unlawfully being denied another job by the same employer, then the employee would be constrained eiher to contribute by his labor to an employer who has treated him unfairly and who persists in that unfair treatment, or to take less than a whole remedy for injuries suffered. Again, to reduce a remedy unless the employee consents to serve his employer during the eleven years it may take, as here, to obtain that remedy, would force impossibly onerous choices on the employee and, because the employee's readiness to bring charges would be inhibited, the Act's purpose of ending

economic discrimination would be frustrated.

Similarly, if a portion of the relief otherwise due is to be denied because the person aggrieved fails to seek his remedy with adequate industry, where the legally offending parties are equally culpable for that delay, and where a chief cause of the delay is reliance on proper and preferred process, then employers would obtain protection for persistence in unlawful action, and reliance on the Act would itself be found a buttress of economic discrimination.

Such rules cannot be abided. Accordingly, though it may seem bold to grant sixteen years' seniority where less than five were served, the court concludes that nothing less will do.

Therefore, as United and ALPA by their mutual opposition to Mrs. Sangster's employment as a stewardess caused her an injury for which they are liable, injury which includes, in addition to denial of that position, loss of seniority which otherwise would have accrued, the court holds that Mrs. Sangster is entitled by way of relief to reinstatement in the position of stewardess with such seniority as would have been hers on November 8, 1968, had United's discriminatory policy never been in effect, plus full seniority credit for the period since that date to the present. It is so ordered.

No just reason for yet more delay appearing, partial summary judgment with respect to fewer than all the issues shall be entered for Mrs.

Sangster. Fed. R. Civ. P. 54(b). Judgment will be entered on the issues of liability and reinstatement with seniority in accordance with the order herein made, leaving for later resolution the issues of monetary damages, interest, and attorney fees.

Further, the court considers that this matter has been pending for an altogether inordinate length of time and, therefore, will entertain no application for stay of this order and judgment, but rather orders that Mrs. Sangster be reinstated with seniority forthwith. See Coffin v. Secretary of Health, Education and Welfare, 400 F.

Supp. 953, 959 (D.D.C. 1975) (appeal pending).

Dated: October 14, 1977.

/s/ Samuel Conti
United States District Judge

FOOTNOTES

1/ Due to an administrative oversight, Mrs. Sangster continued to be carried on United's stewardess seniority list until February 20, 1969, when her name was removed because of her marriage.

2/ Ultimately, ALPA and United reached agreement on contract changes which would have permitted Mrs. Sangster's return to stewardess status. At the time she left United, however, Mrs. Sangster was not privy to the discussions then in prospect, and knew only, as she was informed by United's President Keck, that ALPA had twice refused United's proposal of an extension, that it was unwilling to discuss alteration of the policy further, but that further negotiations would begin July 15, 1969. ALPA and United were unable to agree on the terms of that extension until October 16, 1969, despite protestations now that both were fully in favor of it. As best Mrs. Sangster could discern when she decided to quit her supervisory job, prospects for change either through internal grievance machinery or by way of collective bargaining were dim.

3/ See, e.g., United Airlines, Inc. v. McDonald, 53 L. Ed 2d 423 (U.S., June 20, 1977); United Air Lines Inc. v. Evans, 52 L. Ed 2d 571 (U.S., May 31, 1977); Collins v.

United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971); Lansdale v. United Air Lines, Inc., 437 F.2d 454 (5th Cir. 1971); Inda v. United Air Lines, 405 F.Supp. 426 (N.D. Cal. 1975); Kennedy v. Braniff, 403 F. Supp, 707 (N.D. Tex. 1975); Gerstle v. Continental Airlines, Inc., 5 E.P.D. (CCH) § 8,647 (D.Colo. 1973); Romasanta v. United Air Lines, Inc., 6 E.P.D. (CCH) § 8,806 (N.D. Ill. 1972).

4/ Occidental Life Ins. Co. of California v. EEOC, 53 L. Ed 2d 402, 407 (1977).

5/ Nor did the United-ALPA agreement of October 16, 1969, which would have permitted Mrs. Sangster's transfer with full seniority had she then been with United as a stewardess supervisor, bring a full end to this discriminatory policy, but only further narrowed its impact, as by its terms the agreement applied only to former stewardesses then "currently in a stewardess management . . . position." Thus, the policy continued to bar married stewardess supervisors who had left that position or otherwise failed to maintain continuous seniority, notwithstanding prior application for active stewardess service and continous maintenance of efforts to obtain redress.

6/ Both United and ALPA continue to oppose Mrs. Sangster's reinstatement as a stewardess on the same terms as would have applied to other similarly situated stewardess supervisors. United is willing to reinstate Mrs. Sangster, and did so for one day on May 1, 1977, but is unwilling to pay any back wages. ALPA at one stage seemed willing to accept Mrs. Sangster's reinstatement, but it strenuously opposes reinstatement with full seniority.

[Filed October 14, 1977]
WILLIAM L. WHITTAKER, CLERK

No. C-76-2426

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINDA E. SANGSTER, an individual,	)
Plaintiff,	)
v.	)
UNITED AIR LINES, INC., a Delaware corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization,	)
Defendants.	)

JUDGMENT

It is hereby ordered, adjudged and decreed that plaintiff's motion for partial summary judgment on the issues of liability and reinstatement with full seniority is granted, and plaintiff shall be reinstated in the position of

stewardess with such seniority as would have been hers on November 8, 1968, plus full seniority credit for the period since that date to the present.

No just reason for yet more delay appearing, partial summary judgment with respect to fewer than all the issues shall be entered for Mrs. Sangster. Fed. R. Civ. P. 54(b). Judgment will be entered on the issues of liability and reinstatement with seniority in accordance with the order herein made, leaving for later resolution the issues of monetary damages, interest, and attorney fees.

Defendant Air Lines Pilots Association's motion for summary judgment, or in the alternative to dismiss

the complaint for lack of jurisdiction or failure to state a claim, is denied.

Dated: October 14, 1977

/s/ Samuel Conti
United States District Judge

Entered in Civil Docket
October 17, 1977

APPENDIX C
C 76-2426 SC

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: HONORABLE SAMUEL CONTI, JUDGE

LINDA E. SANGSTER, an individual,

Plaintiff,

v.

UNITED AIR LINES, INC., a Delaware Corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, a labor organization,

Defendants.

REPORTER'S TRANSCRIPT
(Partial)

November 7, 1977

Reported by: Betti A. Murray,
C.S.R., R.P.R., C.P., C.M.
Official Reporter
U.S. District Court
San Francisco, California 94102

A P P E A R A N C E S:

FOR THE PLAINTIFF:

Chickering & Gregory
3 Embarcadero Center
23rd Floor
San Francisco, Ca. 94111

BY: ROBERT W. TOLLEN, ESQ.
and
D. WAYNE JEFFRIES, ESQ.

FOR THE DEFENDANT
UNITED AIRLINES:

Brobeck, Phleger & Harrison
One Market Plaza
San Francisco, Ca. 94105

By: DONALD D. CONNORS, JR., ESQ.

FOR THE DEFENDANT ALPA:

HENNING & WALSH
Shell Bldg.
100 Bush St.
San Francisco, CA 94104

BY: JOHN F. HENNING, JR., ESQ.
and
STEPHEN B. MOLDOF, ESQ.

MONDAY, NOVEMBER 7, 1977

THE COURT: All right. On the facts of this case, the second phase of the case, with reference to the back pay, duty to mitigate, inflation factor and attorneys' fees and amount, came on regularly for hearing on this date. The facts remain the same; that on November 8th, 1968, the plaintiff was denied transfer to a stewardess position; and on July 16, 1969, she quit her position with United as a stewardess supervisor, a position which paid more than the stewardess position she sought.

The Court has held that her quitting the supervisory post may not overcome the unlawfulness of the United's and ALPA's refusal to hire, although it may have some relevance to the issues of damages.

There is a strong policy favoring awards of back pay and the finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer; Albemarle Paper Company versus Moody, 422 US 405.

And the burden is on the defendants to prove unreasonable failure to mitigate. Once the gross amount of back pay owing is calculated, the burden shifts to the defendant to prove what should be deducted therefrom as interim earnings or amounts capable with reasonable diligence. Defendants' burden of proving lack of diligence is not satisfied merely by showing that there was -- that there were further actions which plaintiff could have taken in pursuit of the employment. Rather, the defendant

must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment.

The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct.

In addition, the defendant must show that the plaintiff, had she been diligent, she might have found employment and had some earnings.

And in seeking her work, plantiff need not look outside her own geographic area and for a time, need not accept work unrelated with her skills and interests. And it is Hornbook law that the rule is well settled that a discharged plaintiff is not bound to seek or accept other employment in a

different locality in order to mitigate the damages.

Having that in mind and having the burden of proof that the plaintiff and the defendant -- having the burden of proof that the defendant must sustain, the Court is impressed with the following evidence:

The plaintiff has testified that, with reference to the mitigation of damages in this case, which is the central and crucial issue, the plaintiff has testified that she reviewed classified ads for suitable jobs. However, there is no evidence that she made any calls with reference to her perusal of the classified ad section and we are talking of a period of almost eight years from July 1969 to May, 1977. Also that she applied as a cocktail waitress

or restaurant hostess; the great majority of those, about four applications, made after she consulted her lawyer in December of 1975, and only two before that time.

She inquired by telephone only of four travel agencies regarding employment. She did not apply to other airlines and she did not register at any employment agency for work or with the State nor did she apply for benefits, all of this during the said eight year period.

The plaintiff has no children; she's had ample time to seek other employment in mitigation and the Court finds that she wanted the position of flight attendant and that's all, and she did nothing in mitigation of damages for the eight year period. This plaintiff

does not come anywhere near the minimum standards and her conduct was so deficient as to constitute an unreasonable failure to seek employment. She has an interest in one position only, and that was the interest that she had in being a stewardess, and with only one airline. And 'though the stewardess' position is highly unique and 'though the position of stewardess with zero seniority is a different one than with high seniority, her right to restrict her work search to her own profession and geographical area is not indefinite and there comes a time when she must seek it and here her efforts were unreasonable.

Here we have a woman who is an intelligent, attractive, competent and capable young woman who was a flight attendant, a highly competent person who

should not have had any trouble gaining employment if she had wanted it, but she only wanted to be a flight attendant and that's all, and her activities indicate she had no interest in any other position and the Court is impressed with the facts and finds, as a fact, that the plaintiff really was not interested in any other position during this time. She was not interested in seeking any employment that would in any way mitigate the damages that she alleged that she sustained.

There is a standard, even though the burden of proof is upon the defendant in cases such as this to show the unreasonable failure to mitigate, there still remains a standard of conduct on the part of the plaintiff which must be borne out by the plaintiff and

that standard of conduct in this case was -- that was followed, was so deficient as to constitute an unreasonable failure to seek employment.

We are talking about an eight year period and the amount of contacts with the employment were -- all during this period -- deminimus (phonetic).

The Court then finds that the plaintiff did not mitigate her damages, has not sought to mitigate her damages, and, therefore, is not entitled to any recovery for back pay.

In a Federal tort claims case, the Ninth Circuit has held a little different standard with reference to attorneys' fees. The plaintiff, in a case of this type, is entitled to attorneys' fees except in very unusual

circumstances. And this issue is distinct from her entitlement to back pay.

The Supreme Court said, in the Albemarle case, that while Title VII appears to leave attorney fee awards in the District Court's discretion, the great public interest in having injunctive actions brought would be vindicated only if successful plaintiffs act as private attorney generals with awarded attorneys' fees in all but unusual circumstances.

The Ninth Circuit has held that the amount of the award should not be such as would discourage others from attacking discriminatory practices, but that it should be also a proportionate amount to which extent the plaintiff prevails. That's Schaffer (phonetic) versus San Diego Cabs, 462 Fed. 2d. 102,

and within that framework, the Court's discretion is guided by the usual factors applying to awards of attorneys' fees.

In this case, the plaintiff's attorneys were successful in gaining the relief sought with reference to her back seniority. They were successful in that regard. They were unsuccessful in the receiving of back pay and the Court, taking that into consideration together with, with reviewing the time schedule here, awards attorney fees in the sum of $5,537 plus costs.

Now, the Court, directing its attention now to the attorney for the defendants, I had told you at one time that the question of apportionment of attorneys' fees would be determined by the Court at a later date. Do you

desire, at this time, the Court to make an allocation of the award of attorneys' fees, or do you want to take that up between yourselves?

MR. CONNORS: I think we might try to take care of it between ourselves, unless Mr. Moldorf disagrees.

MR. MOLDOF: I'm agreeble with that, Your Honor.

THE COURT: Just make the judgment against the defendants in the sum of $5,537; is that agreeable?

MR. CONNORS: Yes, we can fight it out some other place.

THE COURT: Some other place than here, huh?

MR. CONNORS: Yes.

THE COURT: All right. Those are the findings of fact and conclusions of law of the Court and, counsel, will

you prepare judgment in that regard and hand it in within the next few days?

Thank you, gentlemen.

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES 1 THROUGH 8, INCLUSIVE, CONSTITUTE A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

SIGNED /s/ Betti A. Murray

Dated: March 6, 1981

Respectfully submitted,

Robert W. Tollen
CHICKERING & GREGORY

APR 7 1981
ALEX

In The

Supreme Court of the United States

October Term 1980

No. 80-1520

LINDA E. SANGSTER,

Petitioner,

—against—

UNITED AIR LINES, INC.,

—and—

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN B. MOLDOF
Of Counsel:
Peter Herman
COHEN, WEISS & SIMON
605 Third Avenue
New York, New York 10158
Telephone: (212) 682-6077

Attorneys for Respondent Air Line Pilots Association, International.

Printinghouse Press – Bar Ass'n Steno Svc. (Appeals Section) 212-840-1891

QUESTION PRESENTED

Whether the Court below correctly denied back pay under Title VII of the Civil Rights Act of 1964 to an individual plaintiff who willfully and completely removed herself from the labor market, especially after she voluntarily quit a higher-paying, higher-status supervisory position than the position she was denied, and after she had voluntarily accepted and held the higher-paying position for several years.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

DECISIONS BELOW..... 1

STATEMENT OF THE CASE..... 2

REASONS WHY THE WRIT SHOULD BE DENIED..... 6

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES..... 6

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY OTHER AUTHORITIES..... 10

III. THE ISSUES HEREIN DO NOT WARRANT REVIEW..... 14

CONCLUSION..... 15

SUPPLEMENTAL APPENDIX..... 1a

Table of Authorities

Page

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).....6, 7, 9

Bullard v. El Dorado Tire Co., 512 F.2d 901 (5th Cir. 1975)....11

EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976).....10, 11

Franks v. Bowman Transportation Co., 424 U.S. 747 (1964).....13

Grindstaff v. Burger King, Inc., 494 F. Supp. 622 (E.D. Tenn. 1980).....11

Hegler v. Board of Education of Beardon School District, 447 F.2d 1078 (8th Cir. 1971).....10

John S. Doane Co. v. Martin, 164 F.2d 537 (1st Cir. 1947).....10

Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), cert. denied, 423 U.S. 825 (1975).....13

NLRB v. Aycock, 377 F.2d 81 (5th Cir. 1967).....13

NLRB v. Madison Courier, Inc., 505 F.2d 391 (D.C. Cir. 1974)...12

Page

NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1965).....12

NLRB v. Mercy Peninsula Ambulance Service, Inc., 589 F.2d 1014 (9th Cir. 1979).....12, 13

NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966).....13

Phelps Dodge v. NLRB, 313 U.S. 177 (1941).....7, 8

U.S. v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979).....11

Statutes:

National Labor Relations Act, 29 U.S.C. §§151-168.....7, 12

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., ...passim

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1520

LINDA E. SANGSTER,

Petitioner,

-against-

UNITED AIR LINES, INC.,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DECISIONS BELOW

In addition to the decisions and judgments set forth in the Appendix to the Petition for Certiorari (hereinafter "App."), the Judgment of the District Court denying

petitioner's claim for back pay is set forth in the Supplemental Appendix, annexed hereto.

STATEMENT OF THE CASE

This lawsuit involves the claim of one individual, Linda E. Sangster, under Title VII of the Civil Rights Act of 1964. No class-wide relief is sought.

Sangster was employed by United Air Lines as a flight attendant from November 24, 1961 until May 27, 1966, when she voluntarily accepted promotion into the higher-paying position of stewardess-supervisor. Sangster v. United Air Lines, Inc., 438 F. Supp. 1221, 1224 (N.D. Cal. 1977). While employed as a supervisor, Sangster married, and pursuant to United's "no-marriage" policy, lost any continuing rights to return to her former flight

attendant position.* Sangster remained in the supervisory position with United until July 16, 1969, when she voluntarily quit.

Sangster was not employed for a single day in the eight years following her voluntary resignation (633 F.2d at 866; App. A, p.6a); she voluntarily dropped out of the labor market. During this eight year period, Sangster never applied to United or to any other airline for employment, "either as a stewardess or in a supervisory or other capacity", 633 F.2d at 866, App. A, p.6a, despite her knowledge of the

* Sangster's Statement of the Case contains numerous inaccuracies. For example, Sangster was never required to be a member of the union and the challenged "no-marriage" policy was unilaterally maintained by United Air Lines. In addition, the Statement contains many purported "facts" concerning matters such as the timing of the filing of her EEOC charge, and her extensive delay in processing her claim, which are totally irrelevant to the single issue she purports to present. We have ignored responding to these extraneous matters and have limited our Statement to the issue at hand.

availability of such positions, 633 F.2d at 868, App. A, p.13a, and even though a supervisory position was available which might have enabled her to fly with her husband, a pilot for United.

Sangster's "efforts at obtaining other positions were minimal." 633 F.2d at 866, App. A, p.6a. While she allegedly reviewed classified ads, "there is no evidence that she made any calls with reference to her perusal of the classified ad section and we are talking of a period of almost 8 years from July 1969 to May 1977." App. C, p.68a. In this same eight year period, she made but six applications for employment of any kind, and only two of those applications were made before she consulted an attorney in December, 1975. App. C, p.69a. Sangster never registered with the state employment service or with any employment agency, never applied for unemployment insurance, and never took

any courses of any type to improve and/or acquire any skills. App. C, p.69a. The record revealed that Sangster was interested in one job only: the same job for the same employer which she was allegedly denied. App. C, pp.69a-71a.

In light of the foregoing, the District Court understandably concluded, in rejecting Sangster's claim for back pay, that she

> "...did nothing in mitigation of damages for the 8-year period. This plaintiff does not come anywhere near the minimum standards and her conduct was so deficient as to constitute an unreasonable failure to seek employment." App. C, pp.69a-70a.

The Court of Appeals found that the District Court had correctly analyzed the evidence, and affirmed the decision in its entirety*:

---

* The Court of Appeals also affirmed the District Court ruling that Sangster's request for attorney's fees was grossly excessive. That ruling is not before this Court.

> "Sangster was not entitled to remain idle for eight years after quitting substantially equivalent employment even if her right to such employment with a different employer is given full recognition. We conclude that denial of back pay under the circumstances would not frustrate Title VII's remedial purposes." 633 F.2d at 868, App. A, pp. 14a-15a.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The general standards governing back pay awards in Title VII cases were established by this Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Both the Court of Appeals and the District Court below turned to the Albemarle standards, correctly applied them to the facts of this particular case, and provided "carefully articulated...reasons" for denying back pay, as required by Albemarle. 422 U.S. at 421 n.14.

Both lower courts accepted as their starting point the Albemarle standard that back pay is ordinarily required to remedy unlawful discrimination, 633 F.2d at 867, App. A, p.9a; App. C, p.66a, but in addition properly recognized that back pay is not mandatory in all Title VII cases, regardless of the circumstances. Both courts acknowledged, as this Court has often noted, that the back pay provisions of Title VII were "expressly modeled on the back pay provision of the National Labor Relations Act," Albemarle, 422 U.S. at 419 and n.11. Thus, while the duty was on defendants to show that Sangster "could have mitigated her damages", 633 F.2d at 868, App. A, p.12a; App. C, p.66a, the courts below correctly applied this Court's conclusion in Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941), that "[u]nder the NLRA, courts have long held that back pay is not to be

awarded when the evidence shows a willful loss of earnings."

Both lower courts applied the controlling legal standards to the facts presented, which revealed an individual who had voluntarily elected to remove herself entirely from the labor market the day she voluntarily quit her higher-paying supervisory position. The District Court concluded that Sangster "did nothing in mitigation of damages for the eight-year period. This plaintiff does not come anywhere near the minimum standards and her conduct was so deficient as to constitute an unreasonable failure to seek employment." App. C, pp. 69a-70a. The Court of Appeals concluded that "the evidence...was more than sufficient to satisfy appellees' burden of showing that substantially equivalent work was available to Sangster", 633 F.2d at 868, App. A, p.13a, and that "Sangster was not

entitled to remain idle after quitting substantially equivalent employment." 633 F.2d at 868, App. A, p.14a. Faithfully adhering to Albemarle, the Court of Appeals held that "denial of back pay under the circumstances would not frustrate Title VII's remedial purposes." 633 F.2d at 868, App. A, p.15a. Indeed, to sanction an individual's refusal to seek or accept any job other than the precise job (and for the same employer) which she was denied would be tantamount to rewriting the statute by omitting the mitigation principle Congress saw fit to include.

It is clear that the lower courts correctly applied this Court's controlling standards to the facts in this case in deciding to deny the back pay claim.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY OTHER AUTHORITIES

Sangster's claim that there exists a "difference of opinion among the circuits as to whether a discriminatee who fails to mitigate should be denied all back pay" (Petition, pp. 24-25) is sheer fabrication. None of the cases cited suggest any basis for awarding back pay to a plaintiff who totally fails to mitigate by intentionally sitting idly while substantially equivalent employment is available, especially after she quit substantially equivalent, and arguably preferable, employment.

Hegler v. Board of Education of Beardon School District, 447 F.2d 1078 (8th Cir. 1971), John S. Doane Co. v. Martin, 164 F.2d 537 (1st Cir. 1947), EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D.

N.Y. 1976), and Bullard v. El Dorado Tire Co., 512 F.2d 901 (5th Cir. 1975), are all cited by Sangster for the undisputed principle that defendants bear the burden of proof on mitigation, a principle acknowledged and applied by both courts below. In none of these cases did the plaintiff voluntarily and completely remove herself from the labor market.

Similarly, no conflict exists between the decisions below and United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979) or Grindstaff v. Burger King, Inc., 494 F. Supp. 622 (E.D. Tenn. 1980). In each of these cases, the plaintiffs were not, as Sangster incorrectly suggests, "nonmitigating claimants" (Petition, p. 20); they entered the job market and secured interim employment. Nevertheless, the courts not only deducted their actual interim earnings from lost

earnings in calculating back pay, but also deducted additional sums which the courts concluded could have been earned had plaintiffs been more diligent. In complete contrast, Sangster simply bypassed the job market and remained at home.

Sangster concedes that under applicable case law, "it is fair to deduct losses willfully incurred." Petition, p. 24. It is settled law under the National Labor Relations Act* that where, as here, an alleged discriminatee "fails to remain in the labor market," she is not entitled to back pay. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1965). Accord, NLRB v. Madison Courier, Inc., 505 F.2d 391, 397 (D.C. Cir. 1974). As the Court explained in NLRB v.

* As discussed above, the principles developed under the back pay provisions of the NLRA are applicable to Title VII.

Mercy Peninsula Ambulance Service, Inc., 589 F.2d 1014, 1019 (9th Cir. 1979), "[t]o hold otherwise would run contrary to the purposes of the back pay remedy, encourage idleness and reward slothfulness." This result is particularly appropriate where, as here, plaintiff voluntarily left mitigating employment which paid her more than the job she was alleged to have been discriminatorily denied. Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), cert. denied, 423 U.S. 825 (1975); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966); NLRB v. Aycock, 377 F.2d 81 (5th Cir. 1967).

In sum, the purported "conflicts" are non-existent.*

* Sangster's attempt to suggest a conflict with state court decisions interpreting state law makes no sense since the issues herein are to be determined by federal law. Any suggested conflict with Franks v. Bowman Transportation Co., 424 U.S. 747 (1964), is also in error. Consistent with Franks, Sangster was accorded "rightful place" seniority by the courts below.

III.

THE ISSUES HEREIN DO NOT WARRANT REVIEW

There is a clear, consistent and principled line of legal authority for the issue Petitioner seeks to raise. The District Court and Court of Appeals below meticulously and properly applied the controlling principles to the facts presented and carefully articulated their reasons for denying back pay to Sangster. The outcome of this case turned entirely on the particular facts involved and affects only the individual plaintiff in this case. Accordingly, this case is not of sufficient importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN B. MOLDOF

Of Counsel:

Peter Herman
COHEN, WEISS and SIMON

Attorneys for Respondent Air Line Pilots Association, International

SUPPLEMENTAL APPENDIX

JUDGMENT OF THE DISTRICT COURT REGARDING BACK PAY AND ATTORNEY'S FEES

FILED NOV 14, 1977
William L. Whittaker,
Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LINDA E. SANGSTER, an individual, Plaintiff, v. UNITED AIR LINES, INC., a Delaware corporation, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, A labor organization, Defendants.	No. C 76 2426SC JUDGMENT

On October 14, 1977, the Court entered its Order and Judgment granting plaintiff's motion for summary judgment. Defendants were ordered to reinstate plaintiff Linda

E. Sangster to its employ as a flight attendant with full seniority.

On November 7, 1977, the Court tried the remaining issues of monetary relief and attorney's fees, and having made its Findings of Fact and Conclusions of Law, now

ORDERS, that plaintiff take nothing as to monetary relief, and that judgment on said monetary relief is to be entered against the plaintiff and in favor of defendants, and further

ORDERS, that plaintiff's attorney is awarded attorney's fees against defendants in the sum of $5,537.00 plus costs.

Dated: NOV. 10-77

/s/ Samuel Conti
United States District Judge

ENTERED IN CIVIL DOCKET NOV. 15, 1977

No. 80-1520

In the Supreme Court of the United States

LINDA E. SANGSTER,
Petitioner,

vs.

UNITED AIR LINES, INC.,
a Delaware Corporation and
Airline Pilots Association, International,
a labor organization,
Respondents.

Brief of United Air Lines, Inc. In Opposition

DONALD D. CONNORS, JR.
JAMES L. MEEDER
Attorneys for Respondent United Air Lines, Inc.

Of Counsel:
BROBECK, PHLEGER & HARRISON
Spear Street Tower
One Market Plaza
San Francisco, California 94105
(415) 442-0900

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

	Page
Statement of the Case	1
Argument	3
A. The Decision Below Is Not In Conflict With Any Other Court Decisions; The Decision Turns On The Facts Presented At Trial	3
B. The Court Does Not Grant Certiorari To Review Evidence and Discuss Specific Facts	4
Conclusion	5

TABLE OF AUTHORITIES CITED

Cases	Page
Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949)	4
United States v. Johnston, 268 U.S. 220, 227 (1925)	4

No. 80-1520

In the Supreme Court of the United States

LINDA E. SANGSTER,
Petitioner,

vs.

UNITED AIR LINES, INC.,
a Delaware Corporation and
Airline Pilots Association, International,
a labor organization,
Respondents.

Brief of United Air Lines, Inc. In Opposition

STATEMENT OF THE CASE

On November 24, 1961 Linda E. Sangster was hired by United Air Lines, Inc. ("United") as a stewardess. On May 28, 1966 she was promoted to a higher paying job of stewardess supervisor. On April 9, 1968 Sangster married a United pilot and continued her employment as a stewardess supervisor. She later wanted to return to her stewardess job, but was ineligible to do so because of United's "no marriage" rule. On July 16, 1969 Sangster voluntarily quit her job as a stewardess supervisor. (Tr. 126.)[1]

Seven years later, on November 1, 1976, Sangster filed a Title VII action in the United States District Court for the Northern District of California.

1. "Tr....." refers to the Trial Transcript and page.

A trial was held on the issues of back pay and attorney's fees on November 2, 1977.[2] On November 15, 1977, judgment was entered denying Sangster any monetary relief and awarding attorney's fees against the defendants in the sum of $5,537.00.

The District Court explained its judgment at the close of trial as follows:

> "There is a strong policy favoring awards of back pay and the finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer: Albemarle Paper Company Versus Moody, 422 U.S. 405.
>
> "And the burden is on the defendants to prove unreasonable failure to mitigate. Once the gross amount of back pay owing is calculated, the burden shifts to the defendant to prove what should be deducted therefrom as interim earnings or amounts capable with reasonable diligence. Defendants' burden of proving lack of diligence is not satisfied merely by showing . . . that there were further actions which plaintiff could have taken in pursuit of the employment. Rather, the defendant must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment.
>
> "The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct." (Tr. 126-27.)

The District Court proceeded with a detailed review of the evidence (Tr. 127-129) and then pronounced this judgment:

> "The Court then finds that the plaintiff did not mitigate her damages, has not sought to mitigate her damages, and, therefore, is not entitled to any recovery for back pay."

(Tr. 129.)

---

2. Liability and reinstatement were decided by motion for partial summary judgment, which motion was unopposed by United. *Sangster v. United Air Lines, Inc.*, 439 F.Supp. 1221, 1223 (N.D. Cal. 1977).

In affirming the District Court's judgment, the Ninth Circuit made the following observations on the evidence of Sangster's efforts to find other employment after she voluntarily quit her job as a supervisor:

> "She had remained unemployed for eight years between the day she voluntarily quit her job and the time United was ordered to restore her to her position as stewardess with full seniority. She admitted that she did not seek work with another airline after leaving United, either as a stewardess or in a supervisory or other capacity. Her efforts at obtaining other positions were minimal."

Sangster v. United Air Lines, Inc., 633 F.2d 864, 866 (1980).

The Ninth Circuit also found much significance in the fact that Sangster had quit *substantially equivalent employment* when she voluntarily resigned her job as a supervisor:

> "Sangster was not entitled to remain idle for eight years after quitting substantially equivalent employment. . . . We conclude that Sangster did not meet her duty to mitigate her damages, and that denial of back pay under the circumstances would not frustrate Title VII's remedial purposes."

633 F.2d at 868. In short, Sangster willfully incurred back pay losses when she voluntarily quit her higher paying job as a supervisor and then made no meaningful effort to find other employment.

ARGUMENT

A. The Decision Below Is Not in Conflict With Any Other Court Decisions; the Decision Turns on the Facts Presented at Trial

The Ninth Circuit below summarized the law concerning a Title VII complainant's willful loss of earnings this way:

> "The back pay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." *Albemarle Paper Co.*, 422 U.S. at 419, 95 S.Ct.

> at 2372. Under the NLRA, courts have long held that back pay is not to be awarded when the evidence shows a willful loss of earnings. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 198, 61 S.Ct. 845, 854, 85 L.Ed. 1271 (1941). Developed from this general concept, the more specific acts which constitute such willful conduct are: failure to remain in the labor market, refusal to accept substantially equivalent employment, failure diligently to search for alternative work, or voluntarily quitting alternative employment without good reason. *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 174 n.3 (2nd Cir. 1965), *cert. denied,* 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966)."

633 F.2d at 868.

Sangster, in quitting her higher paying job and then making no meaningful attempt to find other employment for eight years, willfully incurred her loss of income. It was this willful loss of earnings and general slothful conduct that controlled the outcome of this case—not some unspecified departure from unidentified Circuit and Supreme Court decisions.

B. The Court Does Not Grant Certiorari to Review Evidence and Discuss Specific Facts

Obviously, petitioner is unhappy with the lower court's determinations that she willfully incurred back pay losses, and that her own idleness bars any recovery. But a litigant's unhappiness with a finding of fact does not constitute a reason for granting certiorari. The Court is simply not in the business of reviewing evidentiary determinations:

> "We do not grant a certiorari to review evidence and discuss specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925). In *Graver Mfg. Co. v. Linde Co.,* 336 U.S. 271, 275 (1949), the Court put it this way:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to

review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Here, there is simply no such error.

CONCLUSION

This is a case in which the facts were determinative of the outcome. Those facts, baldly stated, are these. Sangster quit her higher paying job of stewardess supervisor because she could not have the lesser job as stewardess. For eight years she sought no employment, including employment as a stewardess, even though such work was available (633 F.2d at 868). She seeks reimbursement for those eight years of idleness. Of course the reimbursement was denied below.

We urge that the petition should be denied.

Respectfully submitted,

DONALD D. CONNORS, JR.
JAMES L. MEEDER

Attorneys for Respondent
United Air Lines, Inc.

Of Counsel:

BROBECK, PHLEGER & HARRISON
Spear Street Tower
One Market Plaza
San Francisco, California 94105
(415) 442-0900